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In The

Supreme Court of the United States

VINCE VINHTUONG NGUYEN,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant's right to a jury trial under the Sixth and Fourteenth Amendments is violated when a prior juryless juvenile adjudication is used by a judge to impose a longer sentence than otherwise would be permissible.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Vince Nguyen, respectfully asks that a writ of certiorari issue to review the judgment of the California Supreme Court in *People v. Nguyen*, No. S154847 filed on July 2, 2009, and modified on August 19, 2009.

OPINION BELOW

The published opinion of the California Supreme Court was issued on July 2, 2009, and is attached as Appendix A. The California Supreme Court's Order modifying its opinion was filed on August 19, 2009, and is attached as Appendix B. The clerk's minutes of sentencing and abstract of judgment in the trial court are attached as Appendix C. The California Supreme Court's Order denying the petition for rehearing filed on August 19, 2009 is attached as Appendix D.

JURISDICTION

The California Supreme Court filed its opinion on July 2, 2009. The California Supreme Court's Order modifying its opinion and denying rehearing was filed on August 19, 2009. This petition is filed within 90 days of the California Supreme Court's Order modifying opinion and denying rehearing, under this Court's Rules 13.1, 30.1 and 29.2.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1998).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

Under California's Three Strikes Law, "If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction." Cal. Penal Code § 667, subsection (e)(1) (West 2009); similar provision at Cal. Penal Code § 1170, subsection 12(c)(1) (West 2009).[1]

[1] A third strike results in a sentence of 25 years to life. Cal. Penal Code § 667, subsection (e)(2)(A) (West 2009), *see, e.g.*, Cal. Penal Code § 1170.12, subsection (c)(2)(A) (West 2009).

> A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement [under the Three Strikes law] if: (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense[;] (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony[;] (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law[;] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

Cal. Penal Code § 667, subsection (d)(3) (West 2009), similar provision at Cal. Penal Code § 1170, subsection 12(b)(3) (West 2009).

STATEMENT OF THE CASE

In 2005, Petitioner was convicted of being a felon in possession of a firearm. After a court trial based on documentary evidence, the trial court found that in 1999, when Petitioner was sixteen years old, he had been adjudicated a ward of the court upon the juvenile court's finding that he committed a violation of Cal. Penal Code § 245, subdivision (a)(1) (West 2009). Over Petitioner's objection that the use of this juvenile adjudication to increase his sentence beyond the

statutory maximum violated his Sixth Amendment right to jury trial, the trial court sentenced him to prison for 32 months, doubling his sentence pursuant to the Three Strikes Law.[2]

The Sixth Appellate District Court of Appeal held that the use of the Petitioner's prior juvenile adjudication under California's Three Strikes Law is unconstitutional because Petitioner had no right to trial by jury in the juvenile proceeding. The court concluded that "'the role of the jury [is] diminished and eroded in violation of the Sixth and Fourteenth Amendments to the United States Constitution' by the use of juvenile adjudications to increase the maximum punishment for an offense, in light of the United States Supreme Court opinions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (*Apprendi*) and *Blakely v. Washington*, 542 U.S. 296 (2004) (*Blakely*)." *People v. Nguyen*, 62 Cal.Rptr.3d 255, 256 (6th Cir. 2007).

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[2] A felon in possession of a firearm is punishable under the California Determinate Sentencing Law by a term of 16 months, or two or three years. The court sentenced Petitioner to 32 months, double the mitigated term under the Three Strikes Law in light of the prior juvenile adjudication. Under the California scheme in effect at the time Petitioner was sentenced, the federal Constitution did not permit the sentencing judge alone to impose any sentence above the middle Determinate Sentencing Law term, except where an upper-term sentence was authorized by virtue of "the fact of a prior conviction." *See Cunningham v. California*, 549 U.S. 270, 288-93 (2007); *People v. Black*, 41 Cal.4th 799, 805, 809-10 (2007). Petitioner's 32 month sentence exceeded the middle term for this offense. Thus, the court's use of the prior juvenile adjudication as a "strike" increased Petitioner's actual punishment above the middle-term maximum.

The Attorney General then sought review in the California Supreme Court, which issued a decision in *People v. Nguyen*, 46 Cal.4th 1007 (2009).

The California Supreme Court recognized that the trial court's use of the prior juvenile adjudication as a "strike" increased Petitioner's actual punishment above the maximum penalty permitted by law. Nonetheless, the majority held that: "[T]he absence of a constitutional or statutory right to jury trial under the juvenile law does not, under *Apprendi*, preclude the use of a prior juvenile adjudication of criminal misconduct to enhance the maximum sentence for a subsequent adult felony offense by the same person." App. A at 34. The court reasoned that the prior criminal misconduct establishing recidivism was previously and reliably adjudicated in proceedings that included all the procedural protections the Constitution requires for such proceedings – indeed, every substantial safeguard required in an adult criminal trial except the right to a jury. App. A at 22.

The *Nguyen* court also suggested that the defendant's right under California law to have a jury determine whether he was the person who suffered the prior juvenile court adjudication (a right that petitioner waived) may satisfy *Apprendi*. App. A at 40.

Justice Kennard authored a powerful dissent. She recognized that "[t]his is not a matter of semantics. A conviction is obtained in a trial court proceeding at which the adult defendant has the right

to jury trial. By contrast, a juvenile court adjudication results from a proceeding at which the accused juvenile has no right to a jury trial." App. A at 44. The majority's reasoning that prior juvenile adjudications may constitutionally be used because they have been "reliably adjudicated in proceedings that included . . . every substantial safeguard *except* the right to jury trial," misses the point. App. A at 45. "'The Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential fact finders'." App. A at 45 (quoting *Ring v. Arizona*, 536 U.S. 584, 607 (2002)). "The problem here is not that prior juvenile court adjudications are unreliable. The problem is that the facts underlying a juvenile court adjudication were determined by 'a single employee of the State,' namely the judge, which is contrary to 'the system envisioned by a Constitution that guarantees trial by jury'." App. A at 45 (Scalia, J., concurring) (quoting *Apprendi*, 530 U.S. at 498).

Justice Kennard further determined that the language in *Apprendi* requires a jury trial not only on the "fact" of the existence of a prior adjudication, but also on the conduct that lead to that adjudication. App. A at 40. "[T]o permit the mere existence of a prior non-jury juvenile court adjudication to increase the penalty for a later crime beyond the statutory maximum is contrary to the rationale underlying *Apprendi*." App. A at 41.

The California Supreme Court modified its opinion on August 19, 2009.

This petition followed.[3]

REASONS FOR GRANTING THE WRIT

A. Introduction

In the nine years since *Apprendi* was decided this Court has turned down numerous requests to decide whether the Sixth and Fourteenth Amendments permit a judge to equate a prior juryless juvenile adjudication with a prior criminal conviction and impose a longer sentence than otherwise would be permissible. Petitioner urges the Court to take *this case* because a recent study demonstrates the California Supreme Court is by far the most influential state supreme court[4] and because California's Three Strikes Law is the most punitive habitual offender statute in the country,[5] requiring a defendant's sentence to be

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[3] Petitioner may not be able to seek relief on the grounds set forth in this petition in federal habeas because the Ninth Circuit has held there is no clearly established authority of the subject under 28 U.S.C. § 2254, subsection (d)(1) (1996). *See Boyd v. Newland*, 467 F.3d 1139, 1152 (9th Cir. 2006), *cert. denied*, 550 U.S. 933 (2007).

[4] Jake Dear & Edward W. Jessen, *"Followed Rates" and Leading State Cases, 1940-2005*, 41 U.C. Davis L. Rev. 683 (2007).

[5] Families to Amend California's Three-Strikes, *California's Three Strikes Law Fact Sheet* (2004), available at http://www.libertyhill.org/common/to_print/3xFACTSHEET2.pdf; Franklin E.

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increased from several years, to twenty five years to life, based upon two prior juryless juvenile adjudications.[6] In Petitioner's case, his thirty two month sentence, derived from the mitigated term, required him to serve more actual time than a defendant without a strike prior conviction who received the thirty six month maximum sentence.[7] Moreover, numerous legal commentators, unlike the majority of state and

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Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California* (Oxford University Press 2001); Bruce Western, *Punishment and Inequality in America* 64-65 (Russell Sage Foundation 2006); Brian P. Janiskee & Ken Masugi, *Democracy in California: Politics and Government in the Golden State* 104 (Rowman and Littlefield Publishers 2d ed. 2008) (2004).

[6] Under California's Three Strikes Law, two strikes, even based on the same conduct against two victims or the same course of conduct involving one victim can escalate punishment for even a minor felony to twenty five years to life. *People v. Fuhrman*, 16 Cal.4th 930 (1997); *People v. Benson*, 18 Cal.4th 24 (1998), citing Sen. Com. on Judiciary, Assem. Bill No. 971 (1993-1994 Reg. Sess.) as amended Jan. 26, 1994, p. 9 ["This bill does not contain any requirement that the prior offenses be separate"]; *People v. Ortega*, 84 Cal.App.4th 659 (2000).

[7] Without a prior "strike," a defendant can reduce a thirty six month sentence by 50% via good conduct credits. Cal. Penal Code § 2933(a) (West 2009). Thus, he would likely serve approximately eighteen months if sentenced to the thirty six month maximum. However, because the juvenile adjudication counted as a "strike" prior felony "conviction" in Petitioner's case, the low term sentence of sixteen months was doubled to thirty two months. Cal. Penal Code §§ 667(e)(1), 1170.12(c)(1). Under the Three Strikes Law, good conduct can reduce the thirty two month sentence by only 20%, resulting in an actual sentence of greater than twenty seven months. Cal. Penal Code §§ 667(c)(5), 1170.12(a)(5) (West 2009).

federal courts, are nearly unanimous in their opinion that the Constitution forbids imposing an increased maximum sentence based upon a prior juryless juvenile adjudication.[8]

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[8] *See* James C. Levine, Note, *The Armed Career Criminal Act and the US Sentencing Guidelines: Moving Toward Consistency*, 46 Harv. J. On Legis. 537, 553-55 (2009); Melanie Deutsch, *Minor League Offenders Strike Out in Major League: California's Improper Use of Juvenile Adjudications as Strikes*, 37 S.U. L. Rev. 375 (2008); Courtney Fain, Note, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions,"* 49 B.C. L. Rev. 495 (2008); Victor Sze, Note, *A Tale of Three Strikes: Slogan Triumphs Over Substance as Our Bumper-Sticker Mentality Comes Home to Roost*, 28 Loy. L.A. L. Rev. 1047 (1995); Amanda K. Packel, Comments, *Juvenile Justice and the Punishment of Recidivists Under California's Three Strikes Law*, 90 Cal. L. Rev. 1157 (2002); Note, *Constitutional Law – Right to Jury Trial – Eighth Circuit Holds An Adjudication of Juvenile Delinquency to Be a "Prior Conviction" for the Purposes of Sentence Enhancement at a Subsequent Criminal Proceeding*, 116 Harv. L. Rev. 705 (2002); Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 Wake Forest L. Rev. 1111 (2003); Lisa Forquer, Comment, *California's Three Strikes Law – Should a Juvenile Adjudication Be a Ball or a Strike?*, 32 San Diego L. Rev. 1297 (1995); Colleen P. Murphy, *The Use of Prior Convictions after Apprendi*, 37 U.C. Davis L. Rev. 973 (2004); Ellen Marrus, *"That Isn't Fair, Judge": The Cost of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 Hous. L. Rev. 1323 (2004); Alissa Malzman, Note, *Juvenile Strikes: Unconstitutional Under Apprendi and Blakely and Incompatible with the Rehabilitative Ideal*, 15 S. Cal. Rev. L. & Women's Stud. 171 (2005); Jeremy W. Hochberg, *Should Juvenile Adjudications Count as Prior Convictions for Apprendi Purposes?*, 45 Wm. & Mary L. Rev. 1159 (2004); Douglas M. Schneider, *But I was Just a Kid! Does Using*

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As one former member of this Court observed, "the history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring). The procedural right to trial by jury, the Framers' "circuit breaker in the states' machinery of justice," is what this case is about. *Blakely v. Washington*, 542 U.S. 296, 306 (2004). The Framers installed the right to jury trial because the jury's perceived independence prevents oppression by the government, and not because of the jury's fact-finding accuracy. *Duncan v. State of La.*, 391 U.S.

Juvenile Adjudications to Enhance Adult Sentences Run Afoul of Apprendi v. New Jersey?, 26 Cardozo L. Rev. 837 (2005); Jason Abbott, *The Use of Juvenile Adjudications Under the Armed Career Criminal Act*, 85 B.U. L. Rev. 263 (2005); Stephen F. Donahoe, *The Problem with Forgiving (But Not Entirely Forgetting) Crimes of Our Nation's Youth: Exploring the Third Circuit's Unconstitutional Use of Nonjury Juvenile Adjudications in Armed Career Criminal Sentencing*, 66 U. Pitt. L. Rev. 887 (2005); Brian P. Thill, Comment, *Prior 'Convictions' Under Apprendi: Why Juvenile Adjudications May Not Be Used to Increase an Offender's Sentence Exposure if They Have Not First Been Proven to Jury Beyond a Reasonable Doubt*, 87 Marq. L. Rev. 573 (2004); Kevin Holman, Notes & Comments, *Should Little Joey's Juvenile Adjudication Be Used Against Him When he Becomes Joe the Habitually Violent Felon?*, 25 J. Juv. L. 45 (2005); Keith Wood, *Starting the At-Bat Behind in the Count: California's Improper Use of Juvenile Adjudications as a Strike in California's Three Strike Program*, 36 W. St. U. L. Rev. 223 (2009); Redi Kasollja, Case Comment, *First Circuit Upholds Constitutionality of Juvenile Convictions as Predicate Offenses Under the Armed Career Criminal Act – United States v. Matthews*, 498 F.3d 25 (1st Cir. 2007), 41 Suffolk U. L. Rev. 2 (2008).

145, 155-56 (1968); *Schriro v. Summerlin*, 542 U.S. 348, 355 (2004). The Framers' reverence for the jury trial right resulted in it being the only guarantee to appear in both the body of the Constitution and the Bill of Rights.[9] The right to trial by jury in criminal cases was also the only guarantee common to the 12 state constitutions that predated the Constitutional Convention, and it has appeared in the constitution of every State to enter the Union thereafter.[10]

The Framers understood, however, that the jury trial right, unless jealously guarded, might be lost. This Court, in *Jones v. United States*, 526 U.S. 227, 247-48 (1999), *cert. denied*, 540 U.S. 1150 (2004) recently explained that "it is . . . beyond question that Americans of the period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion." Here, as in *Jones*, it is "no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn. . . ." *Id.* at 243-44.

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[9] Article III, § 2, cl. 3 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ." The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

[10] Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 870, 875 n.44 (1994).

Petitioner urges that the line must necessarily be drawn so that the maximum sentence can be increased only where the prior conviction was "established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* at 249. Permitting an increased maximum sentence based upon a juryless juvenile adjudication diminishes and erodes the jury's function because it authorizes past findings to be labeled as "convictions" as long as the legislature doesn't stray "too far" from what looks like a criminal conviction. *Blakely,* 542 U.S. at 307-08. It would allow courts to increase the maximum punishment based on the results of all sorts of "reliable" prior proceedings that do not include the right to jury trial including, for example, convictions in foreign countries that do not provide a right to jury trial. *See United States v. Kortgaard*, 425 F.3d 602, 610 (9th Cir. 2005), or administrative findings of "wrongdoing," such as immigration violations, school suspensions, dependency proceedings, or employment disciplinary measures. *See also United States v. Covian-Sandoval,* 462 F.3d 1090, 1097-98 (9th Cir. 2006), *cert. denied*, 549 U.S. 1301 (2007).

Given their reverence for the jury guarantee it is unlikely "that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is too far." *Blakely,* 542 U.S. at 308. Instead, "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." *Id.* Contrary to the Framers' vision of the

Sixth Amendment, California's use of prior juvenile adjudications to enhance adult criminal sentences beyond the statutory maximum has eroded and diminished the role of the jury.

B. Federal And State Laws Directing Judges To Use Prior Juvenile Adjudications That Were Not Themselves Subject To A Jury Trial To Increase A Defendant's Sentence Beyond The Statutory Maximum Violate The Right To Jury Trial And Due Process Of Law Guaranteed By The Sixth And Fourteenth Amendments To The United States Constitution.

1. *Apprendi's* Prior Conviction Exception Does Not Encompass A Non-Jury Juvenile Adjudication.

In *Almendarez-Torres v. United States*, 523 U.S. 224, 243-44 (1998) this Court held that courts may increase a defendant's sentence beyond an otherwise binding statutory limit based on the fact that the defendant has previously been convicted of a crime. The following term, however, this Court made clear that the judicial fact-finding allowed by *Almendarez-Torres* is a narrow exception to the defendant's jury trial right, made possible because of the unique circumstance of the conviction itself: "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures

satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249.

It was against this background that this Court, in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), "confirm[ed] the opinion that [it] expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This Court emphasized that the prior conviction exception is "narrow" and that "there is a vast difference between accepting the validity of a prior judgment entered in a proceeding *in which the defendant had the right to a jury trial* and the right to require the prosecutor to prove guilty beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Id.* at 490, 496 (emphasis added).

Even though the *Apprendi* Court found it "arguable that *Almendarez-Torres* was incorrectly decided," it declined to consider overruling it[11] because "Apprendi [did] not contest the decision's validity." *Id.* at 489-90. In any event, the Court found that *Almendarez-Torres* was "at best an exceptional departure

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[11] This Court need not reconsider its holding in *Almendarez-Torres* in order to resolve the question at issue here. But to the extent that this Court wishes to use this case as a vehicle for reconsidering *Almendarez-Torres*, the validity of that decision could be considered "fairly encompassed" within the question presented. *See* Sup. Ct. R. 21.1(a).

from the historic practice" of presenting sentence-enhancing facts to juries and was rooted in the "unique" status of prior convictions. *Id.* at 487, 490.

Obviously, a juvenile adjudication in which the defendant did not have the right to a jury trial is not, in *Apprendi's* words, "a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial." *Id.* at 496. Non-jury juvenile adjudications do not satisfy a prerequisite for the prior conviction exception, namely, that the defendant already has had one opportunity to dispute the state's allegations before a jury. App. A at 43 (Kennard, J., dissenting).

The Ninth Circuit Court of Appeals, the Louisiana Supreme Court and the Oregon Supreme Court have all rendered decisions holding that the Constitution prohibits using a non-jury juvenile adjudication to increase a defendant's sentence beyond the statutory maximum. *United States v. Tighe,* 266 F.3d 1187 (9th Cir. 2001); *State v. Brown,* 879 So.2d 1276, 1290 (La. 2004), *cert. denied*, 543 U.S. 1177 (2005); *State v. Harris,* 118 P.3d 236, 339 (Or. 2005).

In accord with these decisions, numerous scholars around the country have published law review articles arguing that the use of juvenile adjudications obtained without the option for trial by jury to

enhance adult sentences beyond the statutory maximum is unconstitutional and unfair.[12]

In *Tighe,* 266 F.3d at 1194-95, the Ninth Circuit specifically held that the sentencing judge's use of defendant's prior, non-jury juvenile adjudication in order to increase his sentence beyond the statutory maximum under a federal statute, the Armed Career Criminal Act, violated his due process rights and his right to a jury trial under *Apprendi* because the prior conviction exception to *Apprendi* "must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial." The court found that treating juvenile adjudications as "prior convictions" under *Apprendi* "ignores the significant constitutional differences between adult convictions and juvenile adjudications." *Id.* at 1193-94. It noted that *Apprendi's* continued acceptance of the prior conviction exception in *Almendarez-Torres* was "premised on sentence-enhancing prior convictions being the product of proceedings that afford crucial procedural protections – particularly the right to a jury trial and proof beyond a reasonable doubt." *Id.* at 1194. "*Jones*' recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal

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[12] See footnote 9.

convictions: fair notice, reasonable doubt, and the right to jury trial." *Id.* at 1193.

Tighe has been followed in *Boyd v. Newland*, 467 F.3d 1139, 1151-52 (9th Cir. 2006) (refusing to recognize non-jury juvenile adjudications as "convictions" falling within the *Apprendi* exception); and *United States v. Washington*, 462 F.3d 1124, 1141-42 (9th Cir. 2006) (holding that *Apprendi's* prior conviction exception does not apply to juvenile adjudications obtained without a jury trial.).

In *Brown*, 879 So.2d at 1289-90, the Louisiana Supreme Court also held that because a juvenile adjudication is not "afforded all the guarantees afforded adult criminals under the constitution" and "it is not a conviction of any crime," it "cannot be excepted from *Apprendi's* general rule." In reaching its conclusion, the court noted that "[a] review of the history of juvenile courts illustrates why juvenile courts have fewer procedural safeguards." *Id.* at 1285. "[U]nder the guise of *parens patriae*, juvenile courts emphasized treatment, supervision, and control rather than punishment, and exercised broad discretion to intervene in the lives of young offenders." *Id.* at 1286. A court's role in a non-jury juvenile proceeding is not to ascertain whether the child is guilty or innocent but rather to determine whether the child needs the state's "care and solicitude." *Id.* at 1286-89; *see also Application of Gault*, 387 U.S. 1, 15 (1967). Because of the distinctions between the two systems, the court found that a juvenile adjudication is fundamentally

different from a prior conviction. *Brown*, 879 So.2d at 1289.

The court in *Brown* also noted that "[t]o equate this adjudication with a conviction as a predicate offense for purposes of the Habitual Offender Law would subvert the civil trappings of the juvenile adjudication to an extent to make it fundamentally unfair and thus, violative of due process." *Id.*

> Our holdings that due process does not require juveniles be afforded *all* the guarantees afforded adult criminals under the constitution have been premised upon the "civil nature" of a juvenile adjudication, its focus on rehabilitation and the state's role as parens patriae. If a juvenile adjudication, with its lack of a right to jury trial which is afforded to adult criminals, can then be counted as a predicate offense the same as a felony conviction . . . then "the entire claim of *parens patriae* becomes a hypocritical mockery."

Id. (quoting *In re C.B.*, 708 So.2d 391, 400 (La. 1998) (quoting *Londerholm v. Owens*, 416 P.2d 259, 269 (1966))).

The Oregon Supreme Court has also held that a juvenile adjudication without a jury trial right does not fall within the prior conviction exception to *Apprendi*. *Harris*, 118 P.3d at 244-46.[13] The court

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[13] The Oregon court's suggestion that the Sixth Amendment would be satisfied as long as the existence of the prior adjudication is proved to a jury, *Harris*, 118 P.3d at 245, is discussed in Section B(2)(b).

rejected the rationale set forth in *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003), that juvenile adjudications "are so reliable that due process of such law is not offended by such an exemption." *Harris*, 118 P.3d at 245 (quoting *Smalley*, 294 F.3d 1033). Rather, it recognized that the United States Supreme Court "has made clear that reliability is not the sine qua non of the Sixth Amendment; that constitutional provision also serves to divide authority between judge and jury." *Id.* at 245-46. "From the Framers' perspective, the jury was also meant to serve as the people's check on judicial power at the trial court level." *Id.* at 243.

2. The Rationale Asserted For The Use Of Non-Jury Adjudications As Prior Convictions Under *Apprendi* Undermines The Right To Jury Trial.

a. Reliability Of The Juvenile Adjudication Cannot Replace The Right To A Jury Trial.

The California Supreme Court's decision in this case is one of eight from state courts of last resort and federal appellate courts that have held that courts may increase defendants' sentences based on juvenile adjudications, even when those adjudications were not subject to the jury trial right. These cases all share the same reasoning: because the juvenile received all the process that was constitutionally due according to *McKeiver v. Pennsylvania*, 403 U.S. 528 (1976), the adjudication is reliable enough to enhance

the defendant's sentence beyond the statutory maximum despite the denial of a jury trial.[14] Thus, the argument is that such adjudications are so reliable that due process of law is not offended. *See also Smalley*, 294 F.3d at 1032-33.

California is now within this majority view that relies on reliability. The California Supreme Court held that "[I]t makes little sense to conclude under *Apprendi*, that a judgment of juvenile criminality which the Constitution deemed fair and reliable enough, when rendered, to justify confinement of the minor in a correctional institution is nonetheless constitutionally inadequate for later use to establish

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[14] *See People v. Bowden*, 102 Cal.App.4th 387, 393-94 (2002); *People v. Lee*, 111 Cal.App.4th 1310, 1316 (2003); *People v. Superior Court*, 113 Cal.App.4th 817, 833 (2003); *State v. McFee*, 721 N.W.2d 607, 617 (Minn. 2006); *State v. Weber*, 112 P.3d 1287 (Wash. Ct. App. 2005), *cert. denied*, 551 U.S. 1137 (2007); *State v. Hitt*, 42 P.3d 732 (Kan. 2002), *cert. denied*, 537 U.S. 1104 (2003); *see also People v. Huber*, 139 P.3d 628, 632-33 (Colo. 2006); *People v. Palmer*, 142 Cal.App.4th 724, 729-30 (2006); *accord People v. Fowler*, 72 Cal.App.4th 581, 586 (1999); *People v. Buchanan*, 143 Cal.App.4th 139 (2006); *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir. 2005), *cert. denied*, 546 U.S. 981 (2005); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003); *Smalley*, 294 F.3d at 1032-33; *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 880 (2008); *Ryle v. State*, 842 N.E.2d 320, 322-23 (Ind. 2005), *cert. denied*, 549 U.S. 836 (2006); *People v. Smith*, 110 Cal.App.4th 1072, 1079 (2003); *People v. Mazzoni*, 165 P.3d 719, 723 (Colo. Ct. App. 2006); *Nichols v. State*, 910 So.2d 863, 865 (Fla. 2005).

the same individual's recidivism as the basis for an enhanced adult sentence." App. A at 22.

Cases supporting this proposition rest on a fundamental error. Although a juvenile may have received all the process due for a juvenile adjudication, if he had no right to a jury trial, he did not receive the process required for a criminal conviction. *See Duncan*, 391 U.S. at 149 (holding that the Fourteenth Amendment Due Process guarantees a right to jury trial in criminal cases).

Focusing on the reliability of the adjudication alone ignores an important purpose of the Sixth Amendment right to a jury trial. In *Duncan*, 391 U.S. at 149, this Court explained that the essence of the jury trial right is not the fact finder's reliability but the fundamental principal that the community shall stand between the accused and the state. "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 155. The jury plays an essential role in protecting the defendant against government oppression:

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard

> against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. at 156.

Over the years, courts have continued to emphasize the indispensable role of the jury within our constitutional structure. "The Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders." *Ring v. Arizona,* 536 U.S. at 607. The Framers' paradigm for criminal justice is "not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury." *Blakely,* 542 U.S. at 313. The Framers installed a jury trial right because of the jury's perceived independence, not any fact-finding accuracy. *Schriro*, 542 U.S.

at 355. "[T]he jury's importance in establishing the general validity of convictions under the Sixth Amendment is founded upon more than the relatively narrow function of the jury as a reliable factfinder. From the Framers' perspective, the jury was also meant to serve as the people's check on judicial power at the trial court level." *Harris,* 118 P.3d at 243.

This Court has specifically addressed the role of the jury in relation to *Apprendi's* prior conviction rule. Reaffirming that the jury exercises an important element of control within our judicial system, this Court noted:

> [T]he right to jury trial is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. *Apprendi* carries out this design by ensuring that the judge's authority to sentence derived wholly from the jury's verdict. Without this restriction, the jury would not exercise the control that the Framers intended.

Blakely, 542 U.S. at 306.

This Court has addressed, and dismissed, an argument analogous to the California Supreme Court's rationale that the apparent reliability of a juvenile adjudication is a sufficient replacement for the right to a jury trial. In *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004), this Court held that

"[w]here testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Similarly, where a prior conviction is used to increase a defendant's sentence beyond the statutory maximum, the only reliability sufficient to satisfy constitutional demands is the one that the Framers chose: the right to jury trial. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* at 62. Dispensing with the right to a jury trial of an alleged prior conviction because the proof may seem reliable enough is similarly unconstitutional.

Moreover, the apparent reliability of a juvenile adjudication must be evaluated as the product of a system that is fundamentally different from the criminal justice system. Minors are adjudicated pursuant to the paternalistic and rehabilitative confines of the juvenile justice system and regularly obtain treatment and social services in lieu of incarceration. Under state law, a juvenile adjudication is not the result of a jury proceeding and it is not a "conviction" of any crime. Cal. Welf. & Inst. Code § 203 (West 2009). It is a finding of civil delinquency that allows the state to require the juvenile to undergo rehabilitative treatment. Accordingly, this Court has made clear that a court's role in a modern, non-jury juvenile proceeding is "*not* to ascertain whether the child [is] 'guilty' or 'innocent'" but rather to determine whether the child needs the state's "care and solicitude."

Gault, 387 U.S. at 15 (emphasis added); *see also Brown*, 879 So.2d at 1286-89.

Based on the informality and rehabilitative goal of the juvenile system, as well as the role that the jury plays in ensuring accuracy and fairness, many commentators believe that juvenile proceedings may not be as reliable as adult criminal proceedings and that it is easier for prosecutors to obtain juvenile adjudications than criminal convictions.[15] To provide

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[15] *See* Nicole M. Romine, Note, *A Compromised Solution: Balancing the Constitutional Consequences and the Practical Benefits of Using Juvenile Adjudications for Sentence Enhancement Purposes*, 45 Washburn L.J. 113, 129, 241-42 (2005), (citing Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries and Justice; Ensuring the Fairness of Juvenile Delinquency Trials*, 33 Wake Forest L. Rev. 553, 562-63, 569 (1998); Harry J. Kalven & Hans Zeisel, *The American Jury*, 55-56 (Yale University 2003) (1966); Janet E. Ainsworth, *The Court's Effectiveness in Protecting the Rights of Juveniles in Delinquency Cases*, 6 Future Child.: Jur. Ct. 64 (1996); Barry C. Feld, *Justice for Children: The Right to Counsel and the Juvenile Courts* (Northeastern University Press, 1993); Ellen Marrus, *"That Isn't Fair, Judge," supra*, 40 Hous. L. Rev. at 1323-58); Barry C. Feld, *The Transformation of the Juvenile Courts – Part II: Race and the "Crack Down" on Youth Crime*, 84 Minn. L. Rev. 327 (1999); Alissa Malzman, Note, *Juvenile Strikes, supra*, 15 S. Cal. Rev. L. & Women's Stud. at 189; Peter W. Greenwood, *Youth Crime and Juvenile Justice in California: A Report to the Legislature* (Rand Corp. 1983); Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground For Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 293 (2007); Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. Ky. L. Rev. 189 (2007); Note, *Constitutional Law – Right to Jury Trial – Eighth Circuit Holds An Adjudication of Juvenile Delinquency to Be a "Prior Conviction" for the Purposes of Sentence Enhancement at a Subsequent Criminal*

(Continued on following page)

minors with fewer procedural safeguards in the name of rehabilitation and then to use adjudications so obtained to punish them more severely as adults would be "contradictory and fundamentally unfair." *Brown*, 879 So.2d at 1289; *see also Kent v. United States*, 383 U.S. 541, 556 (1966) ("[T]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.").

b. *Apprendi* Requires A Jury Trial On The Conduct Underlying The Adjudication, Not Simply The Fact That The Prior Adjudication Occurred.

A second line of reasoning used to support the use of non-jury juvenile adjudications as prior convictions under *Apprendi* is that the Sixth Amendment would be satisfied so long as the prosecution can prove the existence of the prior non-jury adjudication to a jury in the adult's criminal trial. App. A at 14-15 (suggesting that a trial conducted under Cal. Penal Code § 1025, which only addresses the issue of whether a juvenile judge found a petition alleging juvenile

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Proceeding, 116 Harv. L. Rev. 705, 709 (2002); Cart Rixey, *The Ultimate Disillusionment: The Need for Jury Trials in Juvenile Adjudications*, 58 Cath. U. L. Rev. 885 (2009); *Ballew v. Georgia*, 435 U.S. 223, 232-33 (1978) (holding based on empirical studies, that from the standpoint of the Sixth Amendment, six jurors is the constitutional minimum because accuracy diminishes with the number of fact-finders).

court jurisdiction to be true, would satisfy *Apprendi*); *Harris,* 118 P.3d at 243 (suggesting that such a procedure would satisfy *Apprendi*).

Petitioner contends that this type of jury trial does not satisfy *Apprendi* because it goes only to the issue of whether a juvenile judge found a petition alleging juvenile conduct to be true. However, under the Sixth Amendment, the defendant must at some point have the right to a jury trial and proof beyond a reasonable doubt on the conduct behind the adjudication. As the Court of Appeal in this case stated, "[T]here is a vast difference between proving to a jury that the defendant once suffered a juvenile adjudication, and proving to a jury, from contested facts, that the defendant actually committed the criminal conduct underlying the juvenile adjudication of delinquency that makes him a recidivist." *Nguyen*, 62 Cal.Rptr.3d at 278. "It is *not the adjudication, but the conduct, itself, which is relevant.*" *Id.* at 273 (quoting *People v. Lucky,* 45 Cal.3d 259, 295 n.24 (1988); referencing *People v. Fowler,* 72 Cal.App.4th 581 (1999)). *See also United States v. Blanton*, 367 F.Supp.2d 1288, 1291-92 (2005).

c. Admission By The Minor In The Non-Jury Adjudication Does Not Replace The Right To A Jury Trial.

The fact that petitioner admitted the accusation in juvenile court does not cure the Sixth Amendment violation because he had no right to jury trial at the

time he admitted the allegation. As the Court of Appeal in *Nguyen* explained:

> Blakely's . . . guilty plea . . . was made with the full knowledge that he could have insisted on a jury trial on the underlying facts. Likewise, when Almendarez-Torres made his admission that he had previously been convicted of aggravated felonies, he had already been afforded the chance to challenge the facts underlying those convictions at a jury trial. For both of them, at some point in the proceedings, the jury trial right had fulfilled its constitutional role as the "circuitbreaker in the State's machinery of justice." [citation] . . . it [wa]s the defendant – and not the government – who has made the decision that "its costs [of a jury trial] outweigh its benefits."

Nguyen, 62 Cal.Rptr.3d at 280.

In accord with the Court of Appeals, this Court has observed that "a general grant of jury trial for serious offenses is a fundamental right essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. . . . Even when defendants [waive jury] trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely." *Duncan*, 391 U.S. at 157-58.

By contrast, when the defendant, here, admitted the facts underlying his juvenile adjudication, the jury played no such role, because he had no such

right. Thus, when it came time to sentence defendant as an adult, for a crime he committed as an adult, his sentence did not fully reflect a jury determination, or the voluntary and intelligent waiver of a jury determination. *Nguyen*, 62 Cal.Rptr.3d at 280.

Not only is an admission by a minor far different from an adult's, it is arguably less reliable. Minors do not necessarily have the same incentive as adults to contest the allegations against them[16] and are more likely to comply with adult authority figures.[17] Moreover, the court's role in the juvenile proceeding is not to determine the minor's guilt or innocence, but rather to rehabilitate the minor. *Gault*, 387 U.S. at 15; *In re Teofilio A.*, 210 Cal.App.3d 571, 576 (1989) (describing rehabilitation as "an important objective of the juvenile court law").[18] Thus, it is reasonable to infer that a minor, deemed by California to be insufficiently mature to vote, Cal. Const. art. II, § 2 (West

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[16] For example, in California, although the sentence of a juvenile court can extend only until the minor is 25 years old, Cal. Welf. & Inst. Code §§ 1769, 607 (West 2009), the adult court has jurisdiction to sentence a minor to life in prison, *People v. Spears*, 33 Cal.3d 279 (1983), and to sentence an adult to death. *Gregg v. Georgia*, 428 U.S. 153 (1976); Cal. Penal Code § 190.3 (West 2009).

[17] Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground For Wrongful Convictions?*, *supra*, 34 N. Ky. L. Rev. at 293.

[18] *See also In re Myreshieia W.*, 61 Cal.App.4th 734, 740-41 (1998); *In re Samuel V.*, 225 Cal.App.3d 511 (1990); Cal. Welf. & Inst. Code § 202 (West 2009); Stephen F. Donahoe, *The Problem with Forgiving*, *supra*, 66 U. Pitt. L. Rev. at 887-903.

2009), serve on a jury, Cal. Civ. Proc. Code § 203, subdivision (a)(2) (West 2009), enter into a contract, Cal. Civ. Code § 1556 (West 2009), or marry without parental consent, Cal. Fam. Code § 301 (West 2009), might admit a juvenile petition charging a strike eligible offense he did not commit simply to get out of custody or to obtain rehabilitative services.

3. The Sixth Amendment Does Not Countenance California's Legislative Encroachment On The Jury's Traditional Domain.

In its most recent examination of *Apprendi*, this Court has indicated that in deciding whether *Apprendi* should be extended to situations not previously considered, we must bear in mind "[t]hese twin considerations – historical practice and respect for state sovereignty." *Oregon v. Ice*, 129 S.Ct. 711, 713 (2009). The "animating principle is the preservation of the jury's historical role as a bulwark between the State and the accused at the trial for an alleged offense." *Id.* at 712. Guided by that principle, "our opinions make clear that the Sixth Amendment does not countenance legislative encroachment on the jury's traditional domain." *Id.* at 717. "We accordingly [have] considered whether the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.'" *Id.*

Authorities indicate that, at common law, juveniles had the right to jury trial. As the Court of Appeal in *Nguyen* stated:

> At English common law prior to 1854, juveniles charged with crimes were either tried as adults with the right to jury trial, or were not tried at all. With Parliament's enactment of the Youthful Offenders Act in that year, juveniles lost their jury trial rights in cases of minor crimes such as petty theft, but retained the right in felonies. (*In re Javier A.*, (1984) 159 Cal.App.3d 913, 940, fn. 18 206 Cal.Rptr. 386; see also Comment, *California's Three Strikes Law – Should a Juvenile Adjudication Be a Ball or a Strike?* (1995) 32 San Diego L. Rev. 1297, 1308-1309, citing *Javier A.*; Note, *Juvenile Strikes: Unconstitutional Under Apprendi and Blakely and Incompatible with the Rehabilitative Ideal* (2005) 15 So. Cal. L. Rev. & Women's Stud. 171, 174; Comment, *Prior 'Convictions' Under Apprendi: Why Juvenile Adjudications May Not Be Used to Increase An Offender's Sentence Exposure if They Have Not First Been Proven to a Jury Beyond a Reasonable Doubt,* (2004) 87 Marq. L. Rev. 573, 583).

Nguyen, 62 Cal.Rptr.3d at 257-58.[19]

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[19] *See also In re Javier A.*, 159 Cal.App.3d at 930-32; William Blackstone, *Commentaries on the Law of England*, 4 Blackstone 23 (1765-1769); Julian W. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 106 (1909); *Gault*, 387 U.S. at 16-17 (showing that at the time of the adoption of the Constitution and the Sixth Amendment, juveniles accused of crime did have the right to jury trial.).

Given that juveniles were afforded the right to a jury trial at the inception of our Constitutional paradigm, California's use of judge-found facts encroaches upon facts historically found by the jury and threatens the jury's domain as a bulwark between the State and the accused. According to this Court's opinion in *Ice*, *Apprendi* applies to this situation, and prohibits the use of a prior juryless juvenile adjudication to increase a sentence beyond what is otherwise permissible.

The simple rule should be that if a legislature refuses to equip a hearing with all of the protections that the Constitution guarantees to criminal defendants, including trial by jury, it cannot later call an adverse outcome a "conviction" for the purpose of the *Apprendi* prior conviction exception. Here, no jury has ever found that the state may punish petitioner for the conduct alleged in his prior juvenile adjudication, and he never had the right to have a jury make that finding when he entered a plea. Accordingly, the trial court violated the Sixth Amendment by increasing his sentence on that basis.

C. This Court Should Intercede Because The Constitutional Question Presented Is Extremely Important To The Sound Administration Of Criminal Justice.

In *Rangel-Reyes v. United States*, 547 U.S. 1201 (2006), Justice Stevens noted, in denying certiorari, that there was no pressing need for this Court to

reconsider the adult prior conviction exception of *Almendarez-Torres* because "[t]he denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history . . . will seldom create any significant risk of prejudice to the accused." The reason the risk was considered insignificant is because the defendant already had the opportunity to challenge the factual allegations underlying the prior conviction before a jury during the proceedings which led to the prior conviction.

But that is *not* the case with respect to juvenile adjudications. As the Louisiana Supreme Court recognized, the Sixth Amendment requires that a defendant have at least one opportunity to dispute before a jury a state's allegations that subject him to heightened punishment. Therefore, a court may not increase an adult defendant's sentence beyond the statutory maximum based on prior juvenile conduct where the juvenile had no right to dispute the allegations before a jury. The prosecutorial burden is more than simply proving the mere existence of the prior adjudication, it is proving the contested facts underlying the prior juvenile adjudication to a jury. *Brown*, 879 So.2d at 1290. A contrary conclusion encourages trial practices that do not "remain true to the principles that emerged from the Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion.'" *Apprendi*, 530 U.S. at 483.

Accordingly, numerous commentators and parties on every side of this issue have urged this Court to resolve the conflict among the federal circuits and

state supreme courts over whether non-jury juvenile adjudications constitute "prior convictions" for purposes of the *Apprendi* exception.

Congress has also recognized the impact that this division among the courts has on the Armed Career Criminal Act.[20] A February 2007 Congressional Research service report on the ACCA concluded that "the future of the prior conviction exception and its applicability to juvenile adjudications remains unclear, as the U.S. Supreme Court has denied petitions for writ of certiorari in the cases that have adopted the majority view and in cases that have adopted the minority view."[21]

Currently, juveniles accused of criminal behavior in thirty seven states, including California, still have no right to a trial by jury.[22] A large number of adult defendant's sentences in these states are increased beyond the statutory maximum because courts find that they committed prior criminal offenses as juveniles.[23]

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[20] James C. Levine, Note, *The Armed Career Criminal Act and the US Sentencing Guidelines: Moving Toward Consistency*, 46 Harv. J. On Legis. 537, 553-55 (2009).

[21] *Id.* at 554 (citing Alison M. Smith, *Armed Career Criminal Act (ACCA); Using Prior Juvenile Adjudications for Sentence Enhancements*, Cong. Research Serv. 2007, p. 6.).

[22] Stephen F. Donahoe, *The Problem with Forgiving, supra*, 66 U. Pitt. L. Rev. at 904 n.109; James C. Levine, Note, *The Armed Career Criminal Act, supra*, 46 Harv. J. On Legis. at 555.

[23] *See* Neal Miller & Tom McEwen, *Prosecutor and Criminal Court Use of Juvenile Court Records: A National Study*, 5

(Continued on following page)

For such defendants, a finding that they engaged in criminal behavior as juveniles can make an enormous difference in the length of the sentence that courts may impose. Having a record of prior juvenile adjudications allows a court to increase an adult defendant's sentence by over forty years in eleven states, by twenty to forty years in six states, and by one to twenty years in seven states.[24] The application of habitual offender statutes to juveniles is unfair because this Court has recognized that they are "categorically less culpable than the average criminal." *Roper v. Simmons*, 543 U.S. 551, 567 (2005).

The impact of a judicial finding that a defendant has a record of juvenile adjudications is particularly serious in states with three-strikes laws or similar offender points-based enhancements. California, Louisiana, and Texas each have three-strikes laws under which juvenile adjudications may count in an adult's sentence for all but the final strike. Under these laws, a judicial finding respecting a defendant's juvenile adjudication can spell the difference between a term of a few years and a life sentence for his first adult conviction. *See, e.g., Lee,* 111 Cal.App.4th at 1316 (upholding the use of a prior juvenile adjudication as one strike under the California Three-Strikes Law). Florida uses a points-based approach that is

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Institute for Law and Justice (1996), available at http://www.ilj.org/publications/juvenile_records.pdf.

[24] Joseph B. Sanborn, Jr., *Striking Out on the First Pitch in Criminal Court,* 1 Barry L. Rev. 7, 21 (2000).

similar to California's Three-Strikes Law; again, juvenile adjudications can serve as all but the final strike. *See, e.g., McCullough v. Singletary,* 967 F.2d 530 (11th Cir. 1992), *cert. denied*, 507 U.S. 975 (1993) (upholding the use of defendant's juvenile adjudication record to enhance a burglary and sexual assault conviction into a life sentence). In numerous other states, courts' findings that adult defendants committed criminal conduct as juveniles routinely expose defendants to several months or years of extra prison time.

Petitioner urges this Court to take review in order to settle the division in the courts and define the scope of criminal defendants' jury trial rights relating to sentencing based upon prior juvenile adjudications. The issue is one that continually recurs and that generates large differences in the duration and severity of sentences for criminal defendants. It also is one that implicates constitutional protections of "surpassing importance." *Apprendi,* 530 U.S. at 476.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to remedy the violation of his rights to a jury trial and due process of law, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted on the 17th day of November, 2009,

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APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. VINCE VINHTUONG NGUYEN, Defendant and Appellant.	S154847 Ct.App. 6 H028798 Santa Clara County Super Ct. No. CC476520

(Filed Jul. 2, 2009)

California's Three Strikes Law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d))[1] increases the maximum sentence for an adult felony offense upon proof that the defendant has suffered one or more qualifying "prior felony convictions" – a term that specifically includes certain prior criminal adjudications sustained by the defendant, while a minor, under the juvenile court law. (§§ 667, subd. (d)(3), 1170.12, subd. (b)(3); see Welf. & Inst. Code, § 601 et seq.) Does the United States Constitution allow such use of a prior juvenile adjudication even though there was no right to a jury trial in the juvenile proceeding? Like the majority of recent decisions to address the issue, we conclude the answer is yes.

The question arises in the following context: A series of United States Supreme Court decisions,

[1] All further unlabeled statutory references are to the Penal Code.

SEE DISSENTING OPINION

beginning with *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), establishes an adult criminal defendant's general right, under the Fifth, Sixth, and Fourteenth Amendments, to a *jury* finding beyond reasonable doubt of any fact used to increase the sentence for a felony conviction beyond the maximum term permitted by conviction of the charged offense alone. (E.g., *Oregon v. Ice* (2009) 555 U.S. ___, ___ [129 S.Ct. 711, 714] (*Ice*); *Cunningham v. California* (2007) 549 U.S. 270, 274-275 (*Cunningham*); *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 (*Blakely*); *Apprendi, supra,* at p. 490.) *Apprendi* found this principle inherent in the common law tradition, in effect when the Sixth Amendment was adopted, that any fact crucial to the maximum punishment for an offense was, for that purpose, an "element" of the offense, and thus equally subject to the requirements of indictment or presentment, proof beyond reasonable doubt, and jury trial. (*Apprendi, supra,* at pp. 476-485.)

Here, in adult felony proceedings, the complaint charged, for purposes of sentence enhancement, that defendant previously had sustained a juvenile adjudication which qualified as a "prior felony conviction" under the Three Strikes Law. By statute, California affords an adult criminal defendant the right to a jury trial on whether he or she "has suffered" an alleged prior conviction. (§§ 1025, subds. (a), (b), 1158.) *Defendant waived that jury-trial right in this case.* Documentary evidence presented to the court indicated that, in a prior juvenile proceeding, defendant,

then 16 years old, had admitted committing an aggravated assault, and an adjudication to that effect had been entered accordingly. On this basis, the sentencing court in this case found the prior conviction allegation true. Applying the "second strike" provision of the Three Strikes Law, the court doubled defendant's sentence for the current offense.

Nonetheless, defendant claims the *Apprendi* rule barred use of the prior juvenile adjudication to enhance his maximum sentence in the current case because the prior *juvenile proceeding*, though it included most constitutional guarantees attendant upon adult criminal proceedings, did not afford him the right to a jury trial. (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528 (*McKeiver*); *People v. Lara* (1967) 67 Cal.2d 365, 398; *In re Daedler* (1924) 194 Cal. 320; see Welf. & Inst. Code, § 702.) He bases this claim on language employed by the United States Supreme Court to justify an *exception* to the *Apprendi* rule – i.e., that "the fact of a prior conviction," used to enhance the maximum sentence for a later offense, *need not* be proved to a jury beyond reasonable doubt, but may simply be found by the sentencing court. (*Apprendi, supra,* 530 U.S. 466, 490; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 239-247 (*Almendarez-Torres*); see *Jones v. United States* (1999) 526 U.S. 227, 248-249 (*Jones*).)

The high court has given several reasons for treating "the fact of a prior conviction" differently from other sentencing facts that may increase the maximum punishment for an offense. The court has

noted that "recidivism" is a highly traditional basis for a court to increase a current offender's sentence, and that, unlike a typical "element," this factor relates not to the circumstances of the current offense, but only to punishment. Finally, in remarks upon which defendant primarily relies, the court has stressed that prior convictions have been obtained in proceedings which themselves included substantial procedural protections, including proof beyond reasonable doubt *and the right to a jury trial.* (*Apprendi, supra,* 530 U.S. 466, 488, 496; *Jones, supra,* 526 U.S. 227, 249; see *Almendarez-Torres, supra,* 523 U.S. 224, 243-244.)

On this basis, the Court of Appeal agreed with defendant that, under *Apprendi,* the absence of a jury-trial right in juvenile proceedings bars the use of prior juvenile adjudications to increase the maximum sentence for a subsequent adult felony offense. In essence, the Court of Appeal found *Apprendi* requires a jury-trial right *at some point* in the determination of any fact that may increase the maximum sentence for an adult felony conviction.

But the People urge that, because juvenile law adjudications of criminal conduct are subject to virtually all constitutional protections that apply to adult criminal trials – particularly including the standard of proof beyond a reasonable doubt – they fairly and reliably demonstrate the defendant's "recidivism." Thus, the People argue, if a prior juvenile proceeding included *all the rights and guarantees constitutionally applicable therein,* the resulting adjudication satisfies

Apprendi's justifications for the "prior conviction" exception, and is properly included within that exception, even though it did not include the right to a jury trial. Even if the "prior conviction" exception does not apply, the People assert, California complies with the *basic holding* of *Apprendi* by affording the right to a jury trial in the current case as to the sentencing "fact" therein at issue – i.e., the *existence* of the prior juvenile adjudication.

We generally agree with the People. As noted, *Apprendi* requires, at most, the right to a jury trial in the current criminal proceeding with respect to any sentencing fact that may increase the maximum punishment for the underlying conviction. California statutory law afforded defendant the right to have a jury determine the existence of the sentencing fact here at issue – whether he suffered a "prior felony conviction" as defined by the Three Strikes Law – but he waived that right.

In any event, we find nothing in the *Apprendi* line of cases, or in other Supreme Court jurisprudence, that interferes, under the circumstances here presented, with what the high court deemed a sentencing court's traditional authority to impose increased punishment on the basis of the defendant's recidivism. That authority may properly be exercised, we conclude, when the recidivism is evidenced, as here, by a *constitutionally valid* prior adjudication of criminal conduct. As we explain below, the high court has expressly so held in analogous circumstances. (See *Nichols v. United States* (1994) 511 U.S. 738

(*Nichols*).) We will therefore reverse the judgment of the Court of Appeal.

FACTS AND PROCEDURE

An amended complaint, filed in December 2004, charged defendant Vince Vinhtuong Nguyen[2] with four felony counts: possession of a firearm by an ex-felon (§ 12022.1, subd. (a)(1)), possession of ammunition by an ex-felon (§ 12316, subd. (b)(1)), possession of a billy (§ 12020, subd. (a)(1)),[3] and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The amended complaint also charged two misdemeanors, being under the influence of a controlled substance (*id.*, § 11550, subd. (a)) and possession of drug paraphernalia (*id.*, § 11364, subd. (a)). Finally, for sentencing purposes the amended complaint alleged, under the Three Strikes Law, that defendant had suffered, as a qualifying "prior felony conviction" (§§ 667, subd. (d)(3), 1170.12, subd. (b)(3)), a 1999 juvenile adjudication for assault with a deadly weapon (§ 245, subd. (a)(1)), committed when he was 16 years of age or older.

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[2] The Court of Appeal spelled defendant's middle name "Vinthuong," as do the briefs in this court. However, all trial court records, including the amended complaint and the abstract of judgment, spell it "Vinhtuong." We adopt the latter spelling.

[3] The offense described in section 12020, subdivision (a)(1) is a "wobbler," for which the defendant can be charged and/or convicted of either a felony or a misdemeanor. (See § 17, subds. (a), (b).)

In March 2005, pursuant to a negotiated disposition, defendant pled no contest to one felony, firearm possession by an ex-felon, and to a misdemeanor, possession of a billy. The charges of possession of methamphetamine and drug paraphernalia, ex-felon ammunition possession, and being under the influence of a controlled substance were dismissed.

Defendant waived his statutory right to a jury trial on the issue whether he "[had] suffered" the prior strike (§§ 1025, subds. (a)-(b), 1158), i.e., the 1999 juvenile adjudication. This question was tried to the court on the basis of documentary evidence, and the court found the strike allegation true. The court file in the 1999 juvenile matter indicates, among other things, that defendant there admitted to a violation of section 245, subdivision (a)(1).[4]

Defendant objected that because he had no right to a jury *in the juvenile proceeding,* use of his juvenile adjudication as a strike in the current case was a violation of his Sixth Amendment rights.[5] The court rejected this argument and sentenced defendant to the lower term of 16 months for the firearm pos-

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[4] As the Court of Appeal explained, the documents submitted to the court were not made part of the appellate record, and were subsequently lost. Acting on its own motion, the Court of Appeal thus took judicial notice of the juvenile court file.

[5] Defendant does not claim that his juvenile adjudication fails to qualify, under the terms of the Three Strikes Law, as a "prior felony conviction" for purposes of sentence enhancement. Nor, as the dissent points out, does he raise any constitutional objection other than the jury trial issue we address here.

session conviction (Pen. Code, § 18), doubled to 32 months because of the prior strike (*id.*, §§ 667, subd. (e) (1), 1170.12, subd. (c)(1)).[6]

Defendant appealed, raising only the Sixth Amendment sentencing issue. In its first opinion, the Court of Appeal held that, because of the lack of a jury-trial right in juvenile cases, the Sixth Amendment forbids

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[6] *Apprendi*'s jury-trial requirement applies only to sentencing facts that increase the *maximum* penalty for an offense; a sentencing court retains, under *Apprendi*, its discretion to impose a sentence *within the range* permitted solely by the underlying conviction, on the basis of facts not found by a jury. (E.g., *Apprendi, supra*, 530 U.S. 466, 481; see *Harris v. United States* (2002) 536 U.S. 545, 556-569 [sentencing judge alone may find facts increasing *mandatory minimum* sentence].) The Three Strikes Law provides that any determinate sentence for a current felony offense shall be doubled upon pleading and proof of one prior "strike." (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) Ex-felon firearm possession is punishable, under the determinate sentencing law (DSL), by a term of 16 months, or two or three years. (§ 18.) Here, the sentencing court imposed the *lower* DSL term of 16 months, doubled to 32 months under the Three Strikes Law in light of the juvenile prior. That sentence did not exceed the three-year *upper* term for ex-felon firearm possession, but it did exceed the two-year *middle* term for this offense. Under the California scheme in effect at the time defendant was sentenced, the federal Constitution did not permit the sentencing judge alone to impose any sentence above the middle DSL term, except where an upper-term sentence was authorized by virtue of "the fact of a prior conviction." (See *Cunningham, supra*, 549 U.S. 270, 288-293; *People v. Black* (2007) 41 Cal.4th 799, 805, 809-810 (*Black*).) The court's use of the prior juvenile adjudication as a "strike" increased defendant's actual punishment above that middle-term maximum. Under such circumstances, we assume the *Apprendi* issue is properly raised in this case. The People do not contend otherwise.

use of a *contested* juvenile adjudication as a prior conviction to enhance the sentence for a subsequent adult offense. However, the court originally held that because defendant had admitted, in the juvenile case, that he committed the criminal conduct there at issue, his current sentence was not affected by the earlier deprivation of a right to jury trial, and he therefore was not entitled to relief.

The Court of Appeal granted rehearing to reconsider this latter holding. On rehearing, the court reversed the trial court. This time, the majority held that, because minors tried for criminal offenses as juveniles are denied the right to jury trials, the use of *any* juvenile adjudications as prior convictions to enhance subsequent adult sentences is prohibited by the Sixth Amendment.

We granted review.

DISCUSSION[7]

Defendant argues, and the Court of Appeal agreed, that because he had no right to a jury trial in

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[7] Amicus curiae briefs have been filed in support of defendant by (1) Criminal Defense Clinic, Mills Legal Clinic of Stanford Law School, (2) California Public Defenders Association, and (3) Pacific Juvenile Defender Center, Juvenile Law Center, Juvenile Division of the Los Angeles Public Defender, Alternate Public Defender, National Center for Youth Law and Youth Law Center (Pacific Juvenile Defender Center et al.). The Los Angeles County District Attorney has filed an amicus curiae brief in support of the People.

the prior juvenile proceeding, the Fifth, Sixth, and Fourteenth Amendments, as construed in *Apprendi*, bar use of the resulting criminal adjudication to enhance his maximum sentence in this adult proceeding. For several reasons, we reject the contention.

As indicated above, the high court determined in *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. 466, 490.) Thus, under *Apprendi,* any "fact" that allows enhancement of an adult defendant's maximum sentence *for the current offense* must, unless the defendant waives his jury-trial right, be determined by a jury *in the current case.*

Defendant's claim, of course, does not come within this express holding. The statutorily relevant sentencing "fact" in this case is whether defendant's record includes a prior adjudication of criminal conduct that qualifies, under the Three Strikes Law, as a basis for enhancing his current sentence. Aside from any exception that might apply here, the literal *rule* of *Apprendi* thus required only that a jury in the current proceeding determine the existence of such an alleged prior adjudication.

California statutory law afforded defendant precisely this right. Whenever, for purposes of enhancing the sentence on current charges, the prosecution alleges a prior conviction sustained by the defendant,

and the defendant disputes the allegation, the question whether he or she "has suffered" the prior conviction must, unless a jury is waived, be submitted to a jury in the current proceeding. (§§ 1025, subds. (a), (b), 1158.) This jury-trial requirement would extend, of course, to a prior juvenile adjudication included within the Three Strikes Law's definition of a "prior felony conviction." As we have explained, defendant expressly waived his right to a jury trial in the current proceeding on the issue whether he had suffered the alleged prior, and he agreed to submit that issue to the court.[8]

Nonetheless, defendant contends, as below, that under the principles of *Apprendi,* and regardless of his jury-trial rights in the current case, the lack of a

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[8] Defendant suggests in passing that, even if *Apprendi* guarantees only the right to a jury trial in the present case concerning the "fact" of his prior adjudication, California's jury-trial statutes do not satisfy this requirement, because they sharply limit the issues to be decided by the jury trying a prior-conviction allegation. (§ 1025, subd. (c) [issue whether defendant is the person who suffered the prior conviction must be tried to the court]; see *People v. Kelii* (1999) 21 Cal.4th 452, 455-459 [issue whether prior conviction qualifies as "serious felony" for purposes of Three Strikes Law must be determined by court]; *People v. Wiley* (1995) 9 Cal.4th 580, 583, 592 [court, not jury, decides whether prior convictions were upon charges "brought and tried separately"].) However, defendant did not raise that issue below. As noted above, he waived his statutory jury-trial right as to the existence of the prior, and he focused exclusively on whether *Apprendi* permits *any* use of nonjury juvenile adjudications to enhance adult sentences. We therefore need not address his statutory argument here.

jury-trial right in the *prior juvenile proceeding* precludes *all use* of the resulting adjudication to enhance the maximum sentence for his current offense. To support his view that *Apprendi* contemplates such a bar *by implication,* defendant cites language the high court has used to justify the single *exception* it consistently recognizes to the rule that a jury must find sentencing facts which increase the maximum punishment – the exception for "the fact of a *prior conviction*" (italics added). (*Apprendi, supra,* 530 U.S. 466, 490; see also, e.g., *Blakely, supra,* 542 U.S. 296, 301; *United States v. Booker* (2005) 543 U.S. 220, 231; *Cunningham, supra,* 549 U.S. 270, 275; *Ice, supra,* 555 U.S. ___, ___ [129 S.Ct. 711, 714].) For reasons we now explain, we are not persuaded.

The "prior conviction" exception arises primarily from a pre-*Apprendi* case, *Almendarez-Torres.* There, an indictment charged the defendant with the offense of illegal reentry by a deported alien. The pertinent statute increased the maximum punishment if the prior deportation arose from the alien's conviction of one or more aggravated felonies. The indictment did not allege this latter circumstance. However, at his plea hearing, the defendant admitted it, and the court imposed sentence accordingly. On appeal, the defendant urged, among other things, that the Constitution required treatment of his prior convictions as an element of the current criminal offense, which must be charged in the indictment and proved to a jury beyond a reasonable doubt. The court disagreed, refusing to adopt a blanket rule that recidivism – a

"highly traditional" basis upon which courts had imposed increased sentences – must be treated as an element. (*Almendarez-Torres, supra,* 523 U.S. 224, 243-247.)

In *Jones,* which also preceded *Apprendi,* the court addressed a federal statute that punished carjacking in interstate commerce with a maximum sentence of 15 years. However, maximum sentences of 25 years and life imprisonment, respectively, applied if the carjacking resulted in serious bodily injury or death. The government claimed the statute described only a single offense, subject to mere "sentencing enhancements" that need not be separately charged and could be imposed solely by a judge. The defendant insisted the law established three separate offenses, each with its own requirement of charging notice and jury trial. The court chose the latter construction, primarily to avoid the constitutional problem, soon thereafter confirmed in *Apprendi,* of allowing an increased sentence, beyond the maximum provided for the charged offense, on the basis of additional facts not separately alleged or found by a jury.

During an extensive discussion of the Sixth Amendment concerns thus presented, the *Jones* court conceded *Almendarez-Torres* had recently held that sentence-enhancing prior convictions do not require charging notice and proof beyond reasonable doubt to a jury. (*Jones, supra,* 526 U.S. 227, 248.) This holding, *Jones* explained, had depended "in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the

indictment. The Court's repeated emphasis on the distinctive significance of recidivism leaves no question that the Court [in *Almendarez-Torres*] regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing. [Citations.]" (*Jones, supra,* at p. 249.)

In language upon which defendant relies here, the *Jones* court continued: "One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction *must itself have been established* through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." (*Jones, supra,* 526 U.S. 227, at p. 249, italics added.)

Soon after *Almendarez-Torres* and *Jones,* the court squarely held in *Apprendi* that except for the fact of a prior conviction, the Constitution requires any fact which authorizes a penalty beyond the prescribed statutory maximum for the charged offense to be separately alleged in the charging document and proved to a jury beyond a reasonable doubt. *Apprendi* addressed a New Jersey statute that specified the maximum sentence for the offense of possession of a firearm for an unlawful purpose, but provided additional punishment if the trial court found, by a preponderance of evidence, that the unlawful purpose was to intimidate on the basis of group bias.

The *Apprendi* court rejected New Jersey's attempt to defend the statute by invoking *Almendarez-Torres*. For multiple reasons, the court explained, the rule of *Almendarez-Torres* was confined to recidivism as a sentencing fact. As in *Jones*, the court noted *Almendarez-Torres*'s emphasis on recidivism as a highly "'traditional'" basis for imposition of increased punishment by sentencing courts. (*Apprendi, supra*, 530 U.S. 466, 488.) As defendant emphasizes, however, the court also noted, as it had in *Jones*, that the evidence of Almendarez-Torres's recidivism consisted of *prior adjudications* of criminal conduct obtained in proceedings which themselves afforded substantial constitutional protections.

Thus, the *Apprendi* court observed that "[b]ecause Almendarez-Torres had *admitted* the three earlier convictions for aggravated felonies – all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own – no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court." (*Apprendi, supra*, 530 U.S. 466, 488.) In other words, the court concluded, "[b]oth the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." (*Ibid.*)

Finally, the *Apprendi* court distinguished *Almendarez-Torres* from the situation presented in *Apprendi* itself. The court observed: "The reasons supporting an exception from the general rule for the statute construed in [*Almendarez-Torres*] do not apply to the New Jersey [hate crime] statute [at issue in *Apprendi*]. Whereas recidivism 'does not relate to the commission of the offense' itself, [citation], New Jersey's biased purpose inquiry goes precisely to what happened in the 'commission of the offense.' Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." (*Apprendi, supra,* 530 U.S. 466, 496, italics added.)[9]

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[9] Both we and the United States Supreme Court have confirmed that the "prior conviction" exception extends beyond the bare "fact" that such a conviction occurred, and permits the sentencing court, without a jury, to determine related issues about a prior conviction's relevance to the recidivist sentencing scheme, when those issues primarily involve either legal questions of a kind typically decided by judges, or factual matters that may be conclusively determined by examination of the official court record in the prior case. (See, e.g., *Shepard v. United States* (2005) 544 U.S. 13, 16, 26 [sentencing court may examine statutory definition of prior charge, as well as official court records in prior case that conclusively establish elements therein adjudicated, to determine if nature of prior conviction qualifies it as basis for increasing current sentence]; *People v. McGee* (2006) 38 Cal.4th 682, 708-709 [under *Apprendi*, sentenc-

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From these remarks, defendant, the Court of Appeal, and the dissent have drawn the inference that, under *Apprendi*, the defendant's "recidivism" may enhance the current sentence only insofar as this "recidivism" – i.e., the defendant's prior *criminal behavior* – either is found true by a jury in the current proceeding, or was *already found true* in a prior proceeding wherein he or she had protections that included the right to a jury trial. In other words, they conclude, *Apprendi* means the jury-trial right – along with the right to charging notice and the right to proof beyond a reasonable doubt – must attach *at some point* to the determination of any fact about an adult offense, or offender, that increases the maximum punishment for the offense beyond the prescribed statutory range.

However, we do not read *Apprendi* so broadly. For reasons we set forth below, we agree with the majority view that the Fifth, Sixth, and Fourteenth

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ing court, not jury, determines from court records in prior case whether it qualifies for use under recidivist sentencing scheme]; *Black, supra*, 41 Cal.4th 799, 818-820 [court, not jury, decides from court records whether prior convictions are numerous and of increasing seriousness]; *People v. Towne* (2008) 44 Cal.4th 63, 72-83 (*Towne*) [court, not jury, may determine from records of prior convictions whether defendant served prior prison terms, committed the current offense while on parole, or has performed poorly on parole or probation].) It is also now clear that *Apprendi* does not require a jury determination of facts bearing on whether to impose concurrent or consecutive sentences for separate offenses. (*Ice, supra*, 555 U.S. ___, ___-___ [129 S.Ct. 711, 716-719]; *Black, supra*, at pp. 820-823.)

Amendments, as construed in *Apprendi,* do not preclude the sentence-enhancing use, against an adult felon, of a prior valid, fair, and reliable adjudication that the defendant, while a minor, previously engaged in felony misconduct, where the juvenile proceeding included all the constitutional protections applicable to such matters, even though these protections do not include the right to jury trial.

The United States Supreme Court has confirmed that minors accused under the juvenile law of criminal conduct for which they may be confined in a correctional institution are constitutionally entitled to virtually all the procedural rights and protections they would enjoy as adult criminal defendants. (See *In re Gault* (1967) 387 U.S. 1 (*Gault*) [fair notice of charges; counsel, appointed if necessary; confrontation and cross-examination; testimony by sworn witnesses; privilege against self-incrimination]; *In re Winship* (1970) 397 U.S. 358 (*Winship*) [proof beyond a reasonable doubt]; *Breed v. Jones* (1975) 421 U.S. 519 [double jeopardy].) However, the court has concluded that the Constitution does not afford the right to a jury trial in juvenile proceedings. (*McKeiver, supra,* 403 U.S. 528.)

The various *McKeiver* opinions offered multiple reasons for declining to recognize such a right. At least five justices cited, as a paramount concern, a reluctance to deem juvenile adjudications "criminal proceedings" within the Sixth Amendment's ambit, given the juvenile system's greater emphasis on informality, rehabilitation, and *parens patriae* protection

of the minor, as opposed to the more formal, adversary, and punitive nature of the adult criminal system. (*McKeiver, supra,* 403 U.S. 528, 545-546, 547, 550 (plur. opn. of Blackmun, J.); *id.,* at pp. 551-552 (conc. opn. of White, J.).) As Justice White further noted, such differences ameliorate the need, in the juvenile system, for the jury's role as a community buffer against government oppression, judicial bias, and politicized justice. (*Id.,* at p. 552 (conc. opn. of White, J.).)

On the other hand, five concurring justices in *McKeiver* also were strongly influenced by their determination that a jury is not essential to fair and reliable *factfinding* in a juvenile case. Thus, Justice Blackmun deemed it incorrect to say that "the jury is a necessary component of accurate factfinding" (*McKeiver, supra,* 403 U.S. 528, 543 (plur. opn. of Blackmun, J.)), and further opined that "[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function" (*id.,* at p. 547). Justice White agreed, noting that "[a]though the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge." (*Id.,* at p. 551 (conc. opn. of White, J.).)

These factors have persuaded the overwhelming majority of courts to reject the contention defendant makes in this case. Except for the decision here under review, all California Court of Appeal panels to address the issue in a published opinion, both before and after *Apprendi,* have squarely held that the Fifth,

Sixth, and Fourteenth Amendments permit the use of prior juvenile adjudications to enhance the sentences for subsequent adult offenses, even though there is no right to a jury trial in juvenile proceedings. The United States Supreme Court has denied all petitions for certiorari arising from these cases. (*People v. Del Rio* (2008) 165 Cal.App.4th 439, 441; *People v. Buchanan* (2006) 143 Cal.App.4th 139, 149, cert. denied *sub nom. Buchanan v. California* (2007) U.S. ___ [127 S.Ct. 2920]; *People v. Superior Court* (*Andrades*) (2004) 113 Cal.App.4th 817, 830-834 cert. denied *sub nom. Andrades v. California* (2004) 543 U.S. 884; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1316, cert. denied *sub nom. Lee v. California* (2004) 542 U.S. 906; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1079; *People v. Bowden* (2002) 102 Cal.App.4th 387, 393-395; *People v. Fowler* (1999) 72 Cal.App.4th 581, 586; see *People v. Palmer* (2006) 142 Cal.App.4th 724, 729-734 [*Apprendi* allows use of prior Nevada misdemeanor conviction to enhance sentence, even though there was no right to jury trial in Nevada proceeding].)

The overwhelming majority of federal decisions and cases from other states have reached the same conclusion in the wake of *Apprendi,* holding that non-jury juvenile adjudications may be used to enhance later adult sentences. Again, the United States

Supreme Court has declined numerous opportunities to decide otherwise.[10]

The majority decisions reason, in essence, as follows: Prior juvenile adjudications substantially satisfy all the reasons set forth in *Almendarez-Torres*, *Jones*, and *Apprendi* why prior convictions may be employed to increase the maximum punishment for a subsequent adult offense without the need for jury findings in the later case. Like prior adult criminal

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[10] (E.g., *U.S. v. Matthews* (1st Cir. 2007) 498 F.3d 25, 34-36, cert. denied *sub nom. Matthews v. United States* (2008) ___ U.S. ___ [128 S.Ct. 1463]; *U.S. v. Crowell* (6th Cir. 2007) 493 F.3d 744, 749-751, cert. denied *sub nom. Crowell v. United States* (2008) ___ U.S. ___ [128 S.Ct. 880]; *U.S. v. Burge* (11th Cir. 2005) 407 F.3d 1183, 1187-1191, cert. denied *sub nom. Burge v. United States* (2005) 546 U.S. 981; *U.S. v. Jones* (3d Cir. 2003) 332 F.3d 688, 694-696, cert. denied *sub nom. Jones v. United States* (2004) 540 U.S. 1150; *U.S. v. Smalley* (8th Cir. 2002) 294 F.3d 1030, 1031-1033, cert. denied *sub nom. Smalley v. United States* (2003) 537 U.S. 1114; *People v. Mazzoni* (Colo.Ct.App. 2007) 165 P.3d 719, 722-723; *State v. McFee* (Minn. 2006) 721 N.W.2d 607, 615-619; *State v. Weber* (Wn. 2006) 149 P.3d 646, 649-653, cert. denied *sub nom. Weber v. Washington* (2007) 551 U.S. 1137; *Nichols v. State* (Fla.Dist.Ct.App. 2005) 910 So.2d 863, 864-865; *Ryle v. State* (Ind. 2005) 842 N.E.2d 320, 321-323, cert. denied *sub nom. Ryle v. Indiana* (2006) 549 U.S. 836; *State v. Hitt* (Kan. 2002) 42 P.3d 732, 740, cert. denied *sub nom. Hitt v. Kansas* (2003) 537 U.S. 1104; see *State v. Harris* (Or. 2005) 118 P.3d 236, 238-246 [holding that lack of jury trial in juvenile proceedings does not prevent all use of prior juvenile adjudications to enhance later adult sentences, but does mean defendant is entitled to jury trial *in the adult case* as to the *fact* of the prior adjudication]; but see *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1191-1195; *State v. Brown* (La. 2004) 879 So.2d 1276, 1281-1290, cert. denied *sub nom. Louisiana v. Brown* (2005) 543 U.S. 1177.)

convictions, such prior juvenile judgments do not involve facts about the current offense that were withheld from a jury in the current case, but instead concern the defendant's *recidivism* – i.e., his or her status as a *repeat offender* – a basis on which courts, acting without juries, traditionally have imposed harsher sentences. Moreover, the prior criminal misconduct establishing this recidivism was previously and reliably adjudicated in proceedings that included all the procedural protections the Constitution requires *for such proceedings* – indeed, every substantial safeguard required in an adult criminal trial *except* the right to a jury. Use of such reliably obtained juvenile judgments of prior criminality to enhance later adult sentences does not offend an *adult defendant's* constitutional right to a jury trial in an adult criminal proceeding. Conversely, it makes little sense to conclude, under *Apprendi,* that a judgment of juvenile criminality which the Constitution deemed fair and reliable enough, when rendered, to justify confinement of the minor in a correctional institution is nonetheless constitutionally inadequate for later use to establish the same individual's recidivism as the basis for an enhanced adult sentence. Such a determination would preclude a rational and probative basis for increasing an adult offender's sentence – that he or she was not deterred from criminal behavior by a youthful brush with the law – unless juveniles were afforded a right to jury trial, *which the Constitution does not require.*

However, the minority view, urged by defendant and accepted by the Court of Appeal, is that the right to a jury trial in proceedings leading to the prior adjudication is essential to permitting its use for later enhancement of an adult sentence. As the Court of Appeal suggested, "the jury trial right is an indispensable part of '"a fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions,"'" and, under *Apprendi,* "'"one of the requisite procedural safeguards" necessary for a prior conviction to be exempt from its rule.'"

We agree with the majority view, and disagree with defendant and the instant Court of Appeal. For the reasons repeatedly stated by the majority decisions cited above, we conclude that the *Apprendi* rule does not preclude use of nonjury juvenile adjudications to enhance later adult sentences.

The United States Supreme Court has left no doubt of the importance of the jury trial guarantee, among other due process and fair trial protections, in the formal, fully adversary, and fully penal context in which one is convicted of, and sentenced for, a crime committed as an adult. Under *Apprendi* and its progeny, *every previously unadjudicated fact about an adult offense or offender* that authorizes an increase in the maximum sentence for the adult crime must be specifically alleged or charged, presented to a jury, and proved beyond reasonable doubt except to the extent the defendant waives those rights. Moreover, in concluding that prior convictions are available to

enhance later sentences without new jury involvement, the court has stressed that the defendant enjoyed, among others, the right to a jury trial in those prior adult proceedings.

But the court has struck a delicate balance as to the constitutional treatment of juveniles alleged to have violated the criminal law. Such a juvenile, like an adult accused, faces both the stigma of adjudged criminality and the significant loss of liberty by confinement in a correctional institution if the allegations prove true. Thus, "[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child." (*Winship, supra,* 397 U.S. 358, 365.) Accordingly, the highest standard of factual certainty, proof beyond a reasonable doubt, attaches equally to adult and juvenile proceedings. (*Id.,* at p. 368.) Similar considerations have led the court to insist that most other procedural protections available to accused adults – including the rights to counsel (appointed if necessary), notice of charges, confrontation and cross-examination, and protection against compelled self-incrimination and double jeopardy – be equally available to juveniles subject to adjudication of criminal conduct. (*Gault, supra,* 387 U.S. 1, 31-57; *Breed v. Jones, supra,* 421 U.S. 519, 528-531.)

The court's decision in *McKeiver* not to find a constitutional jury trial right in juvenile proceedings reflected its concern that the introduction of juries in that context would interfere too greatly with the effort to deal with youthful offenders by procedures

less formal and adversarial, and more protective and rehabilitative – at least to a degree – than those applicable to adult defendants. (*McKeiver, supra,* 403 U.S. 528, 545-551 (plur. opn. of Blackmun, J.); *id.* at pp. 551-553 (conc. opn. of White, J.).) But the *McKeiver* majority made clear that the absence of a right to trial by jury did not appreciably undermine the *accuracy* of the *factfinding function* in juvenile cases. (*McKeiver, supra,* at p. 543 (plur. opn. of Blackmun, J.); *id.* at p. 551 (conc. opn. of White, J.).)

If the *parens patriae* features of the juvenile justice system have succeeded in rehabilitating a youthful offender, all well and good. But if the person was not deterred, and thus reoffends as an adult, this recidivism is a highly rational basis for enhancing the sentence for the adult offense. So long as an accused adult is accorded his or her right to a jury trial *in the adult proceeding* as to all facts that influence the maximum permissible sentence, no reason appears why a constitutionally reliable prior adjudication of criminality, obtained pursuant to *all procedural guarantees constitutionally due to the offender in the prior proceeding* – specifically including the right to proof beyond a reasonable doubt – should not also be among the facts available for that sentencing purpose.

We do not read the passages from *Almendarez-Torres, supra,* 523 U.S. 224, *Jones, supra,* 526 U.S. 227, and *Apprendi, supra,* 530 U.S. 466, upon which defendant and the Court of Appeal have relied, as *prohibiting* the use of previously adjudicated criminal misconduct to authorize an increased sentence in a

later criminal case *unless* the prior proceeding – whether juvenile or adult – specifically included the right to a jury trial. Defendant's contrary argument is unconvincing in several respects.

We first note the obvious: Neither *Jones* nor *Apprendi* was directly concerned with deciding the circumstances under which prior adjudications of criminal conduct may be used to enhance the maximum sentence for a subsequent adult offense. Hence, the court's comments on that subject were dictum.

Moreover, nothing in *Jones* or *Apprendi,* or in *Almendarez-Torres* itself, stated or implied that a prior criminal adjudication forming the basis of a "recidivism" sentencing factor in an adult criminal proceeding must always have been obtained in a proceeding that included, in particular, the right to jury trial. Those cases cited a group of procedural rights and safeguards that make prior adult convictions fair and reliable evidence of previous criminal misconduct, but they did not state that each and every one of these guarantees, or any one of them in particular, is essential to the availability of a prior criminal adjudication to furnish such proof.

Finally, as indicated above, *Apprendi* and its progeny concern an *adult's* right to jury findings, in the adult case, of all previously unadjudicated facts that bear upon the maximum sentence for the adult offense. On the other hand, these decisions have suggested that recidivism already adjudicated in fair and reliable prior proceedings may be used to

enhance later sentences without new jury involvement, and the high court has not disturbed *McKeiver*'s determination that juvenile adjudications of criminality *are* constitutionally fair and reliable even though the Constitution does not require jury trials in juvenile proceedings.

Under these circumstances, we decline to hold that a prior juvenile adjudication, highly probative on the issue of recidivism, is unavailable to enhance the punishment for the individual's subsequent adult offenses, for the sole reason that there was no right to a jury trial in the juvenile case.

Defendant and his amici curiae, like the Court of Appeal majority, stress the philosophical difference between juvenile and adult criminal proceedings. This line of reasoning proposes that proceedings under the juvenile law may dispense with jury trials only because, as *parens patriae* attempts by the state to protect, rehabilitate, and reform wayward minors, they are not fully "criminal" in nature, and they lack the truly penal objectives and consequences of the system that governs adult violations of law. Hence, the argument runs, even if a juvenile adjudication is reliable and procedurally fair enough *for juvenile purposes,* it is not sufficiently fair and reliable, without the right to a jury trial, for use to affect a later adult criminal sentence.

Again, we disagree, for the reasons indicated above. Sentence enhancement based on recidivism flows from the premise that the defendant's current

criminal conduct is more serious because he or she previously was found to have committed criminal conduct and did not thereafter reform. A prior juvenile adjudication, like a prior adult conviction, is a rational basis for increased punishment on the basis of recidivism. Indeed, a juvenile prior demonstrates that the defendant did not respond to the state's attempt at early intervention to prevent a descent into further criminality. The high court has never held that the Constitution places a direct restriction on the use of prior juvenile adjudications for this purpose.

Accordingly, we are persuaded that *Apprendi* does not bar the use of a constitutionally valid, fair, and reliable prior adjudication of criminal conduct to enhance a subsequent adult sentence simply because the prior proceeding did not include the right to a jury trial. For the reasons discussed at length above, we agree with the court in *McKeiver,* at least for this purpose, that the absence of jury trials from juvenile proceedings does not significantly undermine the fairness or accuracy of juvenile factfinding.[11]

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[11] Taking issue with *McKeiver*'s premise that the absence of a jury does not materially undermine factfinding accuracy, the Court of Appeal cited *Ballew v. Georgia* (1978) 435 U.S. 223, a post-*McKeiver* case, which held that conviction of a nonpetty offense by a state jury of fewer than six persons violates the Sixth and Fourteenth Amendments. (Compare *Williams v. Florida* (1970) 399 U.S. 78 [holding that jury of as few as six persons in state criminal trial for nonpetty offense does not violate the Constitution].) As the Court of Appeal noted, the high court in *Ballew* cited statistical studies suggesting the dimin-

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Under these circumstances, the philosophical and legal distinctions between the juvenile and adult criminal justice systems – differences that informed *McKeiver*'s determination not to impose a jury-trial entitlement in juvenile cases – fail to convince us that adjudications of criminal conduct obtained in juvenile proceedings without the right to jury trial are

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ished effectiveness of "group deliberation," and thus diminished factfinding accuracy, as the number of jurors decreased. (*Ballew, supra,* at pp. 232-239.) But *Ballew* was concerned with the undoubted right to a jury trial as to the facts of a charged *adult offense,* and it focused on whether the accuracy of factfinding rose or fell depending on the *number of lay jurors* on the panel. Though the court's opinion in *Ballew* briefly described one study indicating a significant degree of judge-jury disagreement in civil cases (*id.,* at p. 238), it did not suggest that, in a juvenile proceeding where a jury is *not* required, *judicial* factfinding is insufficiently reliable.

Defendant also notes that in *Ring v. Arizona* (2002) 536 U.S. 584, which applied *Apprendi* to sentencing facts supporting eligibility for the death penalty, the court rejected Arizona's argument that judicial findings on this subject were sufficiently reliable to satisfy the Sixth Amendment. The court explained that "[t]he Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders." (*Ring,* at p. 607.) Again, however, *Ring* was dealing with an *adult's* right to a jury trial on all previously unadjudicated facts bearing on the maximum punishment for the adult offense (in Ring's case, that he was a major participant in an armored car robbery, and that he personally shot and killed the vehicle's driver). *Ring* was not concerned with facts about *recidivism,* already reliably determined in a *juvenile* proceeding in which the Constitution did not require a jury trial.

unavailable, under *Apprendi*, to increase the maximum punishment for later adult offenses.[12]

Nor does the use of nonjury juvenile adjudications to enhance later adult sentences compromise the core purpose of the constitutional right to a jury trial – to provide a criminal defendant, by application of the lay common sense of the community, "with . . . an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 156.) Implicit in the high court's juvenile justice decisions is the premise that this particular safeguard is not constitutionally essential to a fair and reliable adjudication *in a juvenile case*. Once that adjudication is made, one facing a subsequent adult sentence gains, in the adult proceeding, no meaningful jury-trial protection against government oppression or judicial bias – no "bulwark at trial between the State and the accused" (*Ice, supra,* 555 U.S. ___, ___ [129 S.Ct. 711, 718]) – by virtue of a rule

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[12] Amici curiae Pacific Juvenile Law Center et al. argue that to allow the use of juvenile adjudications to enhance later adult sentences "is inconsistent with the purpose of juvenile court and disregards California's carefully drawn boundaries between juvenile and adult court jurisdiction." This argument, essentially based on nonconstitutional state law, overlooks the express provision in California's Three Strikes Law that certain serious prior juvenile adjudications shall be deemed "prior convictions" available for adult sentence enhancement. (Pen. Code, §§ 667, subd. (d)(3), 1170.12, subd. (b)(3).)

barring use of the earlier finding to enhance the sentence for the current adult offense.

Finally, we deem highly pertinent a decision of the high court in which, overruling prior authority, the court concluded, under analogous circumstances, that a constitutionally valid prior criminal adjudication may be used to enhance the maximum penalty for a subsequent felony offense, even though the prior proceeding did not include all the safeguards required for felony trials.

Thus, in *Scott v. Illinois* (1979) 440 U.S. 367, the court had ruled that one charged with a misdemeanor has no constitutional right to counsel when no period of incarceration is imposed. The next year, in *Baldasar v. Illinois* (1980) 446 U.S. 222 (*Baldasar*), a divided court determined that such an uncounseled misdemeanor conviction, though itself constitutional under *Scott,* could not constitutionally be used to convert a second misdemeanor into a felony for purposes of an Illinois recidivism statute.

In *Nichols,* the court overruled *Baldasar,* holding that a prior constitutionally valid uncounseled misdemeanor conviction could be employed in a subsequent federal felony proceeding to increase the defendant's criminal history score, and thus his maximum punishment, for the felony offense. Among other things, the court noted, as relevant here, that recidivism is a traditional basis for sentence enhancement, that this factor goes only to punishment and does not involve the circumstances of the current offense, and that the

criminal conduct evidenced by the prior conviction was subject to the standard of proof beyond a reasonable doubt. (*Nichols, supra*, 511 U.S. 738, 747-748.) In our view, the court's holding in *Nichols* strongly supports our similar result here.[13]

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[13] We further observe that we see no fatal gap between our holding here and certain portions of our analysis in *Towne, supra*, 44 Cal.4th 63. There we suggested that, under *Apprendi*, the sentencing court alone may find, as the basis for an increased maximum sentence, that the defendant performed poorly during a previous term of parole or probation arising from an earlier conviction, *if* the evidence of such poor performance is the defendant's conviction of one or more new crimes committed during the parole or probationary period. On the other hand, we said, a nonjury "poor performance" finding could not be based "upon . . . evidence of misconduct that was not previously adjudicated in a criminal trial." (*Towne, supra*, at p. 82.) In particular, we admonished, even evidence that a prior probation or parole had been *revoked* on the basis of new criminal conduct could not support a "poor performance" finding by the current sentencing court acting without a jury, because revocation proceedings "do not entail the same procedural safeguards as a criminal trial." (*Id.*, at p. 83.) We noted that although parolees and probationers faced with revocation proceedings are entitled to notice and an opportunity to appear, be heard, and present evidence, "[t]he right to a jury trial and the requirement of proof beyond a reasonable doubt . . . do not apply in revocation proceedings." (*Ibid.*) Of course, like *Almendarez-Torres, Jones*, and *Apprendi, Towne* was not specifically concerned with the use of prior *juvenile adjudications* as evidence of recidivism to increase the maximum punishment for a later crime. Moreover, as in *Almendarez-Torres, Jones*, and *Apprendi*, nothing in *Towne* declares that unless the prior adjudication specifically included the right to a jury trial, its use to demonstrate recidivism that may increase the maximum punishment for a later offense is forbidden. The probation and parole revocation proceedings

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In its most recent examination of the *Apprendi* rule, the high court majority has explained that "[t]he rule's animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense. [Citation.] Guided by that principle, our opinions make clear that the Sixth Amendment does not countenance legislative encroachment on the jury's traditional domain. [Citation.] We accordingly [have] considered whether the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.' [Citation.] In undertaking this inquiry, we remain cognizant that administration of a discrete criminal justice system is among the basic sovereign prerogatives States retain. [Citation.]" (*Ice, supra,* 555 U.S. ___, ___ [129 S.Ct. 711, 717].) In deciding whether *Apprendi* should be extended to situations not previously considered, we must bear in mind "[t]hese twin considerations – historical practice and respect for state sovereignty." (*Ibid.*)

As indicated above, the high court's decisions establish that neither juvenile adjudications nor previously adjudicated recidivism as a sentencing factor

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discussed in *Towne* lack *both* the right to a jury trial *and the requirement of proof beyond a reasonable doubt.* Juvenile adjudications, on the other hand, include the latter requirement, thus substantially bolstering their fairness and reliability as evidence of recidivism. Our reasoning in *Towne* thus does not preclude us from deciding here that the Constitution permits the use of prior juvenile adjudications for that purpose.

is, as a matter of "historical practice," within the "traditional domain" of juries. On the other hand, California, in the exercise of its sovereign prerogative, has made the rational determination, expressed in its Three Strikes Law, that certain serious prior juvenile adjudications should serve as "prior felony convictions" for the purpose of enhancing the sentences for subsequent adult felony offenses.[14] The "twin considerations" identified in *Ice* thus clearly weigh in favor of a conclusion that the *Apprendi* rule should not be construed to bar such use.

We therefore hold, contrary to the Court of Appeal, that the absence of a constitutional or statutory right to jury trial under the juvenile law does not, under *Apprendi,* preclude the use of a prior juvenile adjudication of criminal misconduct to enhance the maximum sentence for a subsequent adult felony offense by the same person.

Accordingly, the judgment of the Court of Appeal is reversed.

BAXTER, J.

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[14] Indeed, the Three Strikes provisions embodied in section 1170.12, including its provision for use of prior juvenile adjudications as strikes, were enacted as an initiative measure by popular vote. (Prop. 184, as approved by voters, Gen. Elec. (Nov. 8, 1994).)

WE CONCUR:

GEORGE, C.J.
WERDEGAR, J.
CHIN, J.
MORENO, J.
CORRIGAN, J.

DISSENTING OPINION BY KENNARD, J.

In California, a minor accused of a crime in a juvenile court proceeding – unlike a person accused in an adult criminal proceeding – has no right to a jury trial. The lack of that right becomes an issue when, as here, a juvenile court adjudication is based on one of certain statutorily specified felonies and later the juvenile, by then an adult, commits another felony. At that point, California's "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i); 1170.12) comes into play. Because of the prior juvenile court adjudication, the sentence for the new felony conviction is doubled, as happened here; with two such priors, the prison term is a minimum of 25 years to life.

Central here is the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), which holds that the federal Constitution requires a jury trial on "any fact" that increases the maximum penalty for a charged offense. Is that right violated when, as here, the additional punishment is imposed because of prior juvenile criminal conduct for which there was no right to a jury trial? The majority perceives no problem. I do.

I

As relevant in this case, defendant as an adult was charged with being a convicted felon in possession of a firearm, a felony. (Pen. Code, § 12021.1, subd. (a)(1).) The prosecution alleged that he had a prior juvenile court adjudication based on a violation of subdivision (a)(1) of Penal Code section 245 (assault with a deadly weapon or by means of force likely to inflict great bodily injury),[1] and that this adjudication was a "strike" under the Three Strikes law. Defendant pled guilty in return for dismissal of other charges against him. At a court trial on the alleged strike, defendant conceded the prior adjudication's existence. But, citing *Apprendi, supra,* 530 U.S. 466, he argued that the use of that prior adjudication to increase the maximum penalty for the new offense violated his Sixth Amendment right to a trial

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[1] A prior *adult conviction* for violating subdivision (a)(1) of Penal Code section 245 is a "strike" if the assault was committed with a deadly weapon (Pen. Code, §§ 667, subd. (d)(1), 1192.7, subd. (c)(31)), but *not* if it was committed by means of force likely to inflict great bodily injury. (*People v. Haykel* (2002) 96 Cal.App.4th 146, 148; see also *People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) But a prior *juvenile court adjudication* for violating the same statute is a strike not only when the assault was committed with a deadly weapon but also when it was committed by means of force likely to inflict great bodily injury. (See Pen. Code, §§ 667, subd. (d)(3)(B), 1192.7, subd. (c)(31); Welf. & Inst. Code, § 707, subd. (b)(14).) This difference between the two categories of priors appears to present a serious constitutional issue. But it was not raised in this case and thus need not be resolved now.

by jury because the adjudication occurred in juvenile court, where he had no right to a jury trial.

The trial court rejected that argument, found the allegation of the prior juvenile adjudication to be true, and sentenced defendant to a total of 32 months in prison (based on 16 months' imprisonment for the current felony, doubled because of the prior adjudication). On defendant's appeal, the Court of Appeal reversed the trial court's judgment. This court granted the Attorney General's petition for review.

II

In a quintet of relatively recent decisions (*Oregon v. Ice* (2009) 555 U.S. ___ [129 S.Ct. 711]; *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*); *United States v. Booker* (2005) 543 U.S. 220 (*Booker*); *Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi, supra,* 530 U.S. 466), the United States Supreme Court has set forth the constitutional principle that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. at p. 490.)

What led to the development of this constitutional rule was the high court's concern about "a new trend in the legislative regulation of sentencing." (*Booker, supra,* 543 U.S. at p. 236.) The court noted in *Booker* that various legislatures had begun to enact sentencing laws providing that if the trial court found

certain statutorily specified facts to exist, it was authorized – and sometimes mandated – to impose a sentence greater than would otherwise have been statutorily permitted. These sentencing laws effectively increased the power of trial courts but diminished that of juries. (*Ibid.*) In the words of *Booker:* "As the enhancements became greater, the jury's finding of the underlying crime became less significant. And the enhancements became very serious indeed. . . . [¶] . . . The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime." (*Id.* at pp. 236-237.)

California's Three Strikes law exemplifies that current trend of harsh sentence enhancements. Under this law, *any* felony, even relatively minor ones ordinarily punishable by a maximum of three years in prison, *must be punished* by a sentence of at least 25 years to life in prison when the defendant has two qualifying prior juvenile adjudications.[2] (Pen. Code, § 667, subds. (d)(3), (e)(2)(A).) When, as here, there is only one such adjudication, the sentence on the

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[2] Although the increased penalties of California's Three Strikes law are mandatory, a trial court has the power to order a juvenile prior as well as a prior adult conviction stricken in the interest of justice. (See Pen. Code, § 1385; *People v. Williams* (1998) 17 Cal.4th 148, 161.)

underlying felony is doubled. (Pen. Code, § 667, subds. (d)(3), (e)(1).) Unlike an adult accused of a crime, a minor so accused in a juvenile court proceeding has, under California law, no right to have a jury determine the truth of the conduct underlying the offense.[3] Yet, as I have just pointed out, under the Three Strikes law a prior juvenile court adjudication increases "the range of sentences possible" (*Booker, supra,* 543 U.S. at p. 236) for an adult charged with a felony, and the increased sentence, to use *Booker*'s words, can be "very serious indeed" (*id.* at p. 236). In basing the additional punishment on alleged facts whose truth was never determined by a jury, the Three Strikes law is, in my view, contrary to the holding of *Apprendi, supra,* 530 U.S. at p. 490, that under the Sixth Amendment to the federal Constitution a criminal defendant has a right to have a jury determine "any fact" that increases the penalty for a charged offense.

The majority advances two reasons for concluding otherwise. As explained below, its reasons are not persuasive.

First, the majority asserts that defendant's claim does not come within the "express holding" (maj. opn., *ante,* at p. 8) of *Apprendi* that "[o]ther than the fact of

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[3] When the juvenile court agrees with the prosecution that the minor is "not a fit and proper subject to be dealt with under the juvenile court law" (Welf. & Inst. Code, § 707, subd. (a)(1)), the minor is charged as an adult, in which case the minor has the right to a jury trial.

a prior conviction, *any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury,* and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. at p. 490 italics added.) According to the majority, here the "fact that increases the penalty . . . beyond the prescribed statutory maximum" (*ibid.*) was not the defendant's felonious *conduct* that led to the prior adjudication in juvenile court; rather, the majority asserts, it was the *adjudication* itself. And, the majority points out, under California law defendant did have the right to have a jury determine whether he was indeed the person who suffered that prior juvenile court adjudication, a right that defendant waived. Thus, the majority concludes, defendant was not denied the right to a jury trial that *Apprendi* requires.

The majority is correct that under California's Three Strikes law the existence of a prior juvenile court adjudication of criminal conduct is the fact that triggers increased punishment. But I construe the italicized language of *Apprendi, supra,* 530 U.S. at page 490, that I quoted in the preceding paragraph as requiring a jury trial not only on the "fact" of the *existence* of a prior adjudication, as the majority does, but also, unlike the majority, as requiring a jury trial on *the conduct* that led to that adjudication.

The prior juvenile court adjudication forming the basis for the increased punishment is simply a legal document telling us that, in a proceeding in which the accused minor had no right to a jury trial, a juvenile court judge determined that the minor committed a

criminal offense. The essential teaching of the high court's decision in *Apprendi, supra,* 530 U.S. 466, is that such nonjury determinations cannot be used to increase criminal penalties beyond prescribed statutory maximums. Thus, to permit the mere existence of a prior nonjury juvenile court adjudication to increase the penalty for a later crime beyond the statutory maximum is contrary to the rationale underlying *Apprendi.* Indeed, the majority's reasoning here opens the door to wholesale evasion or trivialization of the holding in *Apprendi.* Under the majority's reasoning, the Legislature could enact or amend laws to define any sentence-increasing circumstance of the current offense in terms of the existence of a prior court determination or adjudication. Under such a law, a trial judge, rather than a jury, would determine whether a statutorily specified aggravating circumstance (for example, use of a firearm or infliction of great bodily injury) had occurred during the commission of the current crime, after which the jury would be permitted to decide only whether the trial judge had actually made that specific factual determination. This cannot be what the United States Supreme Court intended in *Apprendi.*

Also, the majority's conclusion here is inconsistent with this court's recent decision in *People v. Towne* (2008) 44 Cal.4th 63 (*Towne*). There, this court held that under *Apprendi, supra,* 530 U.S. 466, a defendant's sentence may not be increased based on a prior determination, in a nonjury revocation proceeding, that the defendant had violated the conditions of

probation or parole. *Towne* explained that a sentence may be increased for a prior probation or parole violation only when that violation is based on a conviction for a criminal offense. (*Towne, supra,* 44 Cal.4th at pp. 82-83.) In the latter situation, of course, the defendant would have had the right to a jury trial in the proceeding that resulted in the conviction. Implicit in the holding of *Towne* is the view that the constitutional jury trial right extends to *the conduct* underlying a prior nonjury adjudication and not merely to the existence of that nonjury adjudication. Thus, the majority's conclusion here – that the high court's holding in *Apprendi* can be satisfied by having a jury determine the mere existence of a prior nonjury juvenile court adjudication of criminal conduct – cannot be reconciled with this court's decision in *Towne* that *Apprendi* is *not* satisfied by having a jury determine only the existence of a prior nonjury adjudication of a probation or parole violation.

I now turn to the majority's second reason for concluding that the use of a prior juvenile court adjudication to increase an adult defendant's sentence beyond the "prescribed statutory maximum" (*Apprendi, supra,* 530 U.S. at p. 490) does not violate the defendant's constitutional right to a jury trial, even though the defendant had no right in that prior proceeding to have a jury determine the truth of the facts underlying the prior adjudication. As mentioned earlier, this case is governed by the United States Supreme Court's decision in *Apprendi,* which holds: "Other than *the fact of a prior conviction,* any fact

that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Ibid.*, italics added.)

The majority observes that juvenile priors "concern the defendant's recidivism – i.e., his or her status as a repeat offender" (maj. opn., *ante,* at p. 17, italics deleted), and "the prior criminal misconduct establishing this recidivism was previously and reliably adjudicated in proceedings that included . . . every substantial safeguard required in an adult criminal trial *except* the right to a jury" (*id.* at pp. 17-18). Thus, the majority reasons, "the *Apprendi* rule does not preclude use of nonjury juvenile adjudications to enhance later adult sentences." (*Id.* at p. 18.) Implicit in that reasoning is the majority's view that juvenile priors fall within *Apprendi*'s "fact of a prior conviction" language, which creates an exception to *Apprendi*'s holding that a defendant has a right to have a jury determination of the truth of any factual allegations used to increase the defendant's sentence beyond the statutory maximum.

It is unclear whether *Apprendi*'s "fact of a prior conviction" exception applies to prior juvenile court adjudications. As the majority notes, federal and state courts are divided on the issue. (Maj. opn., *ante,* at p. 17, fn. 10.)

Apprendi itself says that the exception to the jury trial right applies only to the "fact of a prior *conviction.*" (*Apprendi, supra,* 530 U.S. at p. 490 italics

added.) As used in the field of law, the term "conviction" ordinarily does not include juvenile court adjudications. (*People v. Hayes* (1990) 52 Cal.3d 577, 633 ["Juvenile court adjudications under Welfare and Institutions Code section 602 are not criminal convictions, . . . "].) This is not a matter of semantics: A conviction is obtained in a trial court proceeding at which the adult defendant has the right to a jury trial. By contrast, a juvenile court adjudication results from a proceeding at which the accused juvenile has no right to a jury trial. Therefore, it is the right to a jury trial afforded under the Sixth Amendment to the federal Constitution that is at stake here. To borrow language from *Apprendi*, "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial" (*Apprendi, supra,* 530 U.S. at p. 496) and one in which the defendant lacked that right. (See also *Jones v. United States* (1999) 526 U.S. 227, 249 ["[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, *and jury trial* guarantees." (Italics added.)].) It is thus reasonable to infer that when the high court in *Apprendi* created a "prior conviction" exception to the general right to a trial by jury on any fact supporting a sentence increase beyond the statutory maximum, it did so only for proceedings in which the accused did have that right.

The majority's reasoning here – that prior juvenile court adjudications may constitutionally be used because they have been "reliably adjudicated in proceedings that included . . . every substantial safeguard" *except* the right to jury trial (maj. opn., *ante*, at p. 18) – misses the point. "The Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential fact-finders." (*Ring v. Arizona* (2002) 536 U.S. 584, 607.) The problem here is not that prior juvenile court adjudications are unreliable. The problem is that the facts underlying a juvenile court adjudication were determined by "a single employee of the State," namely, the judge (*Apprendi, supra*, 530 U.S. at p. 498 (conc. opn. of Scalia, J.)), which is contrary to "the system envisioned by a Constitution that guarantees *trial by jury*" (*ibid.*, italics added).

For the reasons given above, I conclude that the Sixth Amendment's right to a jury trial does not permit a trial court to impose additional punishment that is based on prior juvenile criminal conduct for which there was no right to a jury trial. Thus, I would affirm the judgment of the Court of Appeal, which held that the trial court erred in doubling defendant's sentence on the underlying crime because of his prior juvenile adjudication.

KENNARD, J.

APPENDIX B

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. VINCE VINHTUONG NGUYEN, Defendant and Appellant.	S154847 Ct.App. 6 H028798 Santa Clara County Super Ct. No. CC476520

ORDER MODIFYING OPINION

(Filed Aug. 19, 2009)

THE COURT:

On the court's own motion, the opinion herein, filed on July 2, 2009, appearing at 46 Cal.4th 1007, is modified as follows:

The second sentence of the final paragraph on page 1020 is modified to read:

Except for the decision here under review, all California Court of Appeal panels to address the issue in a published opinion, both before and after *Apprendi*, have squarely held that the Fifth, Sixth, and Fourteenth Amendments permit the use of prior juvenile adjudications to enhance the sentences for subsequent adult offenses, even though there is no right to a jury trial in juvenile proceedings.

This modification does not affect the judgment.

APPENDIX C

19 SUPERIOR COURT
190 W. HEDDING STREET
SAN JOSE, CA 95110

CASE NO. CC476520
CEN 04068402

DATE 04/26/2005 9:00 AM DEPT. 24

PEOPLE VS. VINCE VINHTUONG NGUYEN
04/19/1983 CAD3744042 CDY BK:Y

L.K.A 5938 SOUTHRIDGE CT
SAN JOSE, CA 95138

CLERK A. HOLLER DSP765 M

HEARING PROBATION AND SENTENCING

JUDGE HON. RAY E. CUNNINGHAM

AGENCY SJ-04313-3760 - KETCHUM

REPORTER A. MINTON

STATUS I-SET - 75000 TW N

DEF. ATTY. PUB DEF D.A. J Berry

APO Hill SUPO-P423

CHARGES F (001) PC12021(A)(1)
F (002) PC12316(B)
VIOLATION DATE
F (003) HS11377(A)
M (004) PC12020(A)(1)
12/22/2004
M (005) HS11550(A)
M (006) HS11364

NEXT APPEARANCE _____

☑ Defendant Present ☐ Not Present ☑ Atty Present Flaxberg AD (PD)/Legal Aide/Special App

☐ Arr'd ☐ Adv ☐ Arr Wav ☐ Amend Comp/Info ☐ Arr ☐ Plea ☐ IDG ☐ PTC ☐ Prob/Sent ☐ Interpreter _____ ☐ Sworn

☐ PC977 ☐ Filed ☐ On File ☐ Reptr. Adv/Wav ☐ Bail/OR/SORP ☐ Rect Dr Rpt ☐ FAR/ERC ☐ Bail Apply ☐ Balance Exonerated

☐ NG ☐ Entered by CRT ☐ NGBRI/Adv ☐ PSet ☐ Prelim ☐ Readiness ☐ S/B MTC ☐ Bail Exonerated ☐ Forfeited Bond # _____

☐ Denies Priors/Allegations/Enhancements/Refusal ☐ Further ☐ Jury ☐ CT ☐ Peo/Def Wav Jury ☐ Reassumption Filed ☐ Forfeiture Set Aside ☐ Bail Rein

☐ TW ☐ TNW ☐ TW/WD ☐ TW Sentence ☐ Ref'd _____ ☐ $_____ Costs Within 30 Days to Court

☐ Ref/Appt PD/AD/Legal Aide ☐ Conflict Decl ☐ APO/Prop 36 ☐ P36 Re-Assm't SORP/OR ☐ Revoked ☐ Reinstated ☐ May Post & Forfeit

☐ _____ Relieved _____ Appt'd ☐ Crim Proc Susp ☐ Rein ☐ BW Ordered $_____ ☐ Stayed ☐ To Issue

☐ Hrg on Motion _____ ☐ Doubl Decl Pursuant PC 1368 ☐ No Cite Release/SCIT ☐ No Request ☐ Cash Only

☐ Granted ☐ Denied ☐ Submitted ☐ Off Cal ☐ Subm on Report ☐ Found _____ ☐ BW Set Aside ☐ Recalled ☐ Filed

☐ Slip to Comm ☐ Drs Appointed _____ ☐ Max Term _____ ☐ Committed _____ ☐ Proof of _____

☐ Prelim Way ☐ Certified to General Jurisdiction ☐ MDA/COM Amended to _____ Court finds strike prior _____

☐ Amended to ☐ (M) VC12500(a)/VC23103(a) ☐ Pur VC23103.5 ☐ DA Stmt Filed Other: _____ valid _____

PLEA Conditions: ☐ None ☐ No State Prison ☐ PC17 after 1 Yr Prob ☐ Includes VOP _____ ☐ Add to Cal

☐ Jail/Prison Term of _____

☑ Dismissal/Striking Cts 2, 3, 5, 6 ☐ Subm time of Sent ☐ Harvey Stip _____

☐ Adv ☐ Max Ren ☐ Parole/Prob ☐ Appeal ☐ Immig ☐ Reg PC200/HS11590/PC457.1/PC186.30 ☐ Future Serious Felony ☑ PC12021(110) ☐ VC14607.8/PC666

☐ Wav Right to ☐ Counsel ☐ Court/Jury Trial ☐ Subpoena/Confront/Examine Witnesses ☐ Self-Incrimination ☐ Written Waiver filed ☐ Plea/Absentia filed

☐ COP ☐ GUILTY ☐ NOLO CONTENDERE to charges & admits enhancements/allegations/priors ☐ PC17 ☐ Arbuckle ☐ Factual Basis found ☐ Findings stated

☐ Prop 36 Granted/Unamenable/Refused/Term ☐ DEJ Eligibility Filed ☐ DEJ Granted/Rein/Term Fee $_____ ☐ Guilty Plea Rendered

☐ Waives Referral ☐ Ref'd to APO Full Rpt ☑ PROBATION DENIED FINES/FEES: PAY TO ☑ Ref to DOR ☐ COURT ☐ TODAY

☐ Sentenced to _____ State Prison/County Jail ☐ Sent Suspended _____ COUNT __ $_____ + PA $_____ ☐ Purs HS11350d

PROBATION ☐ Execution ☐ Imposition of sentence suspended for probation period COUNT __ $_____ + PA $_____

☐ COURT ☐ FORMAL PROBATION GRANTED for _____ Days/Mos/Yrs AIDS/CPP $_____ + PA $_____

☐ Report to APO within _____ Days ☐ Terminated ☐ Upon Release | DPF | $____ + PA $_____

☐ Perform _____ Hrs Volunteer Work as directed PO/SAP/CAP ☐ in lieu of fine | LAB | $____ + PA $_____

☐ Not drive w/o valid DL & Ins ☐ Adv VC23600 ☐ HTO ☐ Delete FOP/MOP | DRF/RF | $ 400 Add'l RF $ 400 Susp'd PC1202.45

☐ MOP ☐ FOP ☐ 12 hrs ☐ 3 mos ☐ 6 mos Enroll within _____ days | AEF | $____ Original Fine $_____

☐ DL Susp/Restr'd/Rvk'd for _____ ☐ To, from, during Work/AlcoPrg/Jail/Sch/App | SECA | $ 20 CTS PC2900.5 $_____

☐ IID Not/Ordered/Rmv'd Term _____ Yrs ☐ DSA thru APO/DOR/CRT ☐ Filed | NC | $____ TOTAL DUE $_____

☐ No contact with victim or family/co-defts unless appr by APO ☐ PC1202.05 | ASF/OPF | $____ Payments Granted/Modified

☐ DVPO Issued/mod/term'd Exp SJPD ☐ Victim Present | AP | $____ $____/Mo beginning _____

☐ Not own/possess deadly weapons ☑ [Destroy]/Return Weapon 04-357-0255 | SHELTER | $____ FINE STAYED _____

☐ Submit Search/Testing ☐ Educ/Voc Trng/Empl ☐ No alcohol/drugs or where sold | DV | $____ Committed @ $____/day ☐ May Pay Out

☐ Substance Abuse, DV, Psych, Parenting, Anger Mgmt, Theft cnsl/prgm | ATTY | $____ Consec/Conc to _____

☑ PC296 (DNA) ☐ PC1202.1 HIV/Tert/Education | | $____ Fine/Fees ☐ Deemed Satisfied ☐ Commuted

VOP: ☐ Wav ☐ Arr'd _____ ☐ Admits/Denies Viol ☐ Court Finds VOP/No VOP | R/INVEST | $____ ☐ P/SUP $_____/Mo ☐ Waived

Prob Rein/Mod/Term'd/Revoked/Remains Revoked/Ext to _____ | CJAF ☐ | $ 207.55

☐ Original Terms & Conditions Except as Amended herein | ☐ Restitution | $____ to _____

☐ Co-terminous with _____ ☐ No Further Penalties/Reviews ☐ To be determined by APO/Court ☐ Referred to VWAC ☐ Collect Civilly

JAIL/PRISON ☐ See Attachm't Pg for Add'l Orders, Charges, PC1385 Reasons

Count	F/M	Violation	Prison Term/Yrs	Enhancement/Priors	Yrs/Styd/Strkn	County Jail HRS/DAYS/MOS
1	F	PC 12021(a)(1)	L/32 mo	PC 667(b)-(1)/1170.12		
4	M	PC 12020(a)(1)				30d c/c

Enhancement	Yrs/S	Enhancement	Yrs/S	Enhancement	Yrs/S	Enhancement	Yrs/S	Enhancement	Yrs/S	Total

CTS = 162 ACT + 80 ☑ PC4019 ☐ PC2933.1 = 242 TOTAL DAYS TOTAL TERM 32 mos

☑ Straight time ☐ In Camp ☐ WWP ☐ PC1209 Fees ☐ Waived ☐ Court Rec _____ All/Except ☐ EMP/PSP/WF/ERP/DRP/Co Parole/NP _____

☐ Sent Deemed Served ☐ Rpt to Local Parole ☑ Adv of 3 Yrs Parole/Appeal Rights ☐ Consec ☐ Conc to _____

☐ Bal CJ Susp ☐ All but _____ Hrs/Days/Mos ☐ On Cond Complete Residential Treatment Prgm ☐ Serve Consec MO/TU/WE/TH/FR/SA/SU 22

☐ Pre-process _____ AM/PM ☐ Stay/Surrender/Transport to _____ @ _____ AM/PM or Sooner

☐ REMANDED BAIL $_____ ☐ NO BAIL ☑ COMMITTED ☐ RELEASED ☐ OR ☐ SORP ☐ DOC TO CONTACT JAC FOR ASSMT ☐ P36
☐ AS COND OF SORP ☐ BAIL INCREASED/REDUCED ☐ TO PRGM AS REC BY JAC-DOC TO TRANSPORT FOR BALANCE OF JAIL ☐ UPON AVAIL BED

PROMISE TO APPEAR: I will appear at all times and places as ordered by the Court, and have read and understand all conditions set forth on the reverse side.
BY _____ DEFENDANT

DISTRIBUTION: BLACK - FILE COPY. GREEN - DOC. BLUE - CJIC/DOR PURPLE - PROBATION. BROWN - DEFENDANT

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE
SINGLE, CONCURRENT OR FULL-TERM CONSECUTIVE COUNT FORM
[Not to be used for multiple count convictions or for 1/3 consecutive sentences.]

CR-290.1

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA BRANCH OR JUDICIAL DISTRICT HOJ	
PEOPLE OF THE STATE OF CALIFORNIA vs. DOB: [Date Of Birth Omitted] DEFENDANT: Vince Vinhtuong Nguyen AKA: CII#: BOOKING INFORMATION: PFW DSP765 CEN: 04068402 ☐ NOT PRESENT	CASE NUMBER CC 476520
COMMITMENT TO STATE PRISON ☐ AMENDED ABSTRACT ABSTRACT OF JUDGMENT	

DATE OF HEARING	DEPT. NO.	JUDGE
04-26-2005	24	Ray E. Cunningham
CLERK	REPORTER	PROBATION NUMBER OR PROBATION OFFICER
A. Holler	A. Minton	J. Hill
COUNSEL FOR PEOPLE ☐ State Attorney General		COUNSEL FOR DEFENDANT ☒ APPTD.
F. Berry		S. Flagsberg

1. Defendant was convicted of the commission of the following felony:

CNT.	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (Month/Date/Year)	CONVICTED BY			TERM L, M, U	TIME IMPOSED	
						Jury	Court	Plea		YRS.	MOS
1	PC	12021(a)(1)	Owning/purchasing/receiving/possess firearm by felon	2004	03-24-2005			X	L	2	8

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENTS.

COUNT	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL	

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTION OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENTS.

ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL	
PC667(b)-(i)/1170.12									

4. ☒ Defendant was sentenced pursuant to PC 667(b)-(i) or PC 1170.12 (two-strikes).

5. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):
Restitution Fine of: $400 per PC 1202.4(b) forthwith per PC 2085.5: $400 per PC 1202.45 suspended unless parole is revoked.
Restitution per PC 1202.4(f): ☐ _____/☐ Amount to be determined to: ☐ victim(s)* ☐ Restitution Fund
(*List victim name(s) if known and amount breakdown in item 7, below.)
Fine(s) [PA included]: $____ per PC 1202.5. $____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ CC ☐ CS
Lab Fee $____ per HS 11372.5(a) for counts _____. ☐ Drug Program Fee of $150 + PA _____ per HS 11372.7(a).
6. TESTING: a. ☐ AIDS pursuant to PC 1202.1 b. ☒ DNA pursuant to PC 296 c. ☐ other (specify):
7. Other orders (specify): **Advised 3 yrs parole. Dismissal 2, 3, 5, 6, PC12021 ordered. Probation denied. SECA $20. Destroy weapon SJPD 04-357-0255. Count 4 misd [PC12020(a)(1)] 30 days c/c.**

8.	TOTAL TIME IMPOSED excluding county jail term:	2	8

9. ☐ This sentence is to run concurrent with (specify):
10. Execution of sentence imposed
a. ☒ at initial sentencing hearing.
b. ☐ at resentencing per decision on appeal.
c. ☐ after revocation of probation.
d. ☐ at resentencing per recall of commitment. (PC 1170(d).)
e. ☐ other (specify):

11. DATE SENTENCE PROUNOUNCED	CREDIT FOR TIME SPENT IN CUSTODY	ACTUAL LOCAL TIME	LOCAL CONDUCT CREDITS	☒ 4019 ☐ 2933.1	SERVED TIME IN STATE INSTITUTION (number of days)
04-26-2005	TOTAL DAYS: 242 INCLUDING:	162	80		☐ DMH ☐ CDC ☐ CRC

12. The defendant is remanded to the custody of the sheriff ☒ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to: ☒ reception center designated by Director, California Department of Corrections.
☐ Other (specify):
CLERK OF THE COURT: I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE	DATE
Gina Colbenson /s/ Gina Colbenson	04-28-2005

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

Form Adopted for Mandatory Use
Judicial Council of California
CR-290.1 [Rev. January 1, 2003]

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE SINGLE, CONCURRENT, OR FULL-TERM CONSECUTIVE COUNT FORM

Penal Code §§ 1170, 1213, 1213.5

APPENDIX D

Court of Appeal, Sixth Appellate District –
No. H028798

S154847

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE,
Plaintiff and Respondent,

v.

VINCE VINTHUONG NGUYEN,
Defendant and Appellant.

(Filed Aug. 19, 2009)

The opinion is modified on the court's own motion.

The petition for rehearing is denied.

Kennard, J., is of the opinion the petition should be granted.

GEORGE
Chief Justice

No. 09-604

Supreme Court, U.S.
FILED
FEB - 4 2010
OFFICE OF THE CLERK

In the Supreme Court of the United States

VINCE VINHTUONG NGUYEN, *Petitioner,*

v.

CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
RENÉ A. CHACÓN
Supervising Deputy Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
Counsel of Record
ERIC D. SHARE
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5849
Fax: (415) 703-1234
Counsel for Respondent

QUESTION PRESENTED

California's Three Strikes law increases the prison terms of felons with one or more prior convictions for "serious" or "violent" felonies—commonly known as strikes. Strikes include specifically defined adjudications of wardship based on such felonies, when committed by a minor sixteen years or older found fit for proceedings under juvenile court law, which does not afford the right to a jury trial. See Cal. Penal Code §§ 667(d)(3), 1170.12(b)(3). Prior juvenile wardship adjudications of strikes are considered prior convictions, which must be alleged in the charging document, and the defendant has a right to a jury determination that the prosecution has proved the prior strike beyond a reasonable doubt. See Cal. Penal Code §§ 667(c), 1025, 1158, 1170.12(d)(1).

The question presented is whether the respective jury-trial and due-process guarantees of the Sixth and Fourteenth Amendments preclude the use of such a prior juvenile wardship adjudication to increase punishment for a new felony in a California Three Strikes prosecution.

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved in this case are the Sixth and Fourteenth Amendments to the United States Constitution.

California's Three Strikes law (Cal. Penal Code §§ 667(b)-(i), 1170.12)[1] provides in part:

> (3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:
>
> (A) The juvenile was sixteen years or older at the time he or she committed the prior offense.
>
> (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.
>
> (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.
>
> (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

§ 667(d); see also *id.* § 1170.12(b) (same).

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[1] Unless otherwise designated, further statutory references are to the California Penal Code.

Section 1025 provides in part:

> (b) Except as provided in subdivision (c), the question whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or in the case of a plea of guilty or nolo contendere, by a jury impaneled for that purpose, or by the court if a jury is waived.
>
> (c) Notwithstanding the provisions of subdivision (b), the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury.

Section 1158 provides in part:

> Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction.

STATEMENT OF THE CASE

1. In December 2004, petitioner, twenty-one years old, was charged with possession of a firearm by a felon (§ 12022.1(a)(1)), possession of ammunition by a felon (§ 12316(b)(1)), possession of a billy (§ 12020(a)(1)), and possession of methamphetamine (Cal. Health & Safety Code § 11377(a)), together with two misdemeanors of being under the influence of a controlled substance and possessing a drug device

(Cal. Health & Safety Code §§ 11550, 11364). Pursuant to California's Three Strikes law (§§ 667(b)-(i), 1170.12), the complaint also alleged, as a qualifying "prior felony conviction" (§§ 667(d)(3), 1170.12(b)(3)), a 1999 juvenile wardship adjudication for assault with a deadly weapon (§ 245(a)(1)) when petitioner was sixteen years of age or older. Clerk's Transcript (C.T.) 6-8.

In March 2005, petitioner pleaded no contest to a felony violation of felon in possession of a firearm and to misdemeanor possession of a billy, in exchange for dismissal of the other charges. C.T. 13. The underlying facts of the current crimes are not described in the record. Petitioner waived his statutory right to a jury trial on the issue of whether he "[h]ad suffered" the prior strike (§§ 1025(a)-(b), 1158). Based upon the record of the 1999 juvenile adjudication, which indicated that petitioner had admitted the assault with a deadly weapon (C.T. 14), the court found the prior strike proven. *People* v. *Nguyen*, 46 Cal. 4th 1007, 1013, 209 P.3d 946, 949 (2009) (*Nguyen*).[2]

Over petitioner's objection that the use of the juvenile adjudication to increase his sentence violated his Sixth Amendment right to a jury trial, the court imposed a sixteen-month prison term for the firearm conviction, and doubled it to thirty-two months under the two-strike-offender part of the

---

[2] The documents submitted to the California Superior Court to prove the prior juvenile adjudication were not made part of the appellate record and were lost. Acting on its own motion, the California Court of Appeal took judicial notice of the juvenile court file. See *Nguyen*, 46 Cal. 4th at 1013, n.4, 209 P.3d at 949, n.4.

Three Strikes law (§§ 667(e)(1), 1170.12(c)(1)). C.T. 22; Reporter's Transcript 16-17.

2. A divided panel of the California Court of Appeal, Sixth Appellate District, reversed. It held that, because juveniles lack a jury-trial right, the use of a juvenile adjudication for recidivism punishment under the Three Strikes law violates the Sixth Amendment. See *Nguyen*, 46 Cal. 4th at 1014, 209 P.3d at 950.

3. On July 2, 2009, the California Supreme Court reversed. The supreme court held that the use of a prior juvenile wardship adjudication as a strike did not violate petitioner's constitutional rights. *Nguyen*, 46 Cal. 4th at 1010, 209 P.3d at 947. The California Supreme Court held that petitioner's sentence did not violate his jury-trial right under the Sixth Amendment, as interpreted by this Court in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000) (*Apprendi*). The state supreme court noted that petitioner had the right under California law to have a jury determine the truth of the fact used to increase his sentence, i.e., the prior juvenile wardship adjudication, and that petitioner had waived his jury-trial right on the sentencing fact in this case. The California Supreme Court further held no Sixth Amendment violation occurs when a constitutionally valid prior adjudication of criminal conduct, including a juvenile wardship adjudication, is used as evidence of recidivism. *Nguyen*, 46 Cal. 4th at 1012, 209 P.3d at 949. On August 19, 2009, the California Supreme Court denied rehearing.

REASONS FOR DENYING THE PETITION

I. BECAUSE PETITIONER WAS ENTITLED TO, BUT WAIVED, HIS STATUTORY RIGHT TO A JURY TRIAL ON THE PRIOR JUVENILE WARDSHIP ADJUDICATION, THIS CASE DOES NOT IMPLICATE *APPRENDI* v. *NEW JERSEY*, 530 U.S. 466 (2000)

1. Citing *Apprendi*, 530 U.S. 466, petitioner asserts that the increase of his sentence based on a nonjury juvenile wardship adjudication violates the Sixth Amendment. Petitioner's argument disregards both his California statutory right to a jury trial on the fact of his juvenile wardship adjudication and his waiver of that jury-trial right. Because *Apprendi* is not implicated when a defendant waives a statutory jury-trial right on a fact used to enhance a sentence above the maximum, certiorari is unwarranted.[3]

2. *Apprendi* held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. *Blakely* v. *Washington*, 542 U.S. 296 (2004) (*Blakely*), explained that "the 'statutory maximum' for

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[3] Since *Nguyen* was decided, this Court has denied petitions for certiorari in several cases raising *Apprendi* challenges to California's use of juvenile wardship adjudications as strikes. See *Alonzo Hale* v. *California*, No. 09-6394, *cert. denied* Jan. 11, 2010; *Deante Dekhoura Stewart* v. *California*, No. 09-7287, *cert. denied* Jan. 11, 2010; and *Charles Gordon* v. *California*, No. 09-6422, *cert. denied* Oct. 20, 2009. As noted in *Nguyen*, prior to the California Supreme Court's decision, this Court had denied petitions for certiorari in numerous California cases finding no constitutional violation in using juvenile adjudications as strikes. See *Nguyen*, 46 Cal. 4th at 1020, 209 P.3d at 954 (and cases cited therein).

Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303. *Blakely* reaffirmed *Apprendi*'s holding that a trial court may make factual determinations to select a sentence within the applicable sentencing range that does not exceed the statutory maximum. *Apprendi*, 530 U.S. at 481; *Blakely*, 542 U.S. at 309.

3. A prior conviction under the Three Strikes law must be pleaded and proved beyond a reasonable doubt under California law. §§ 667(c), 1170.12(d)(1); see also *People* v. *Monge*, 16 Cal. 4th 826, 833-34, 941 P.2d 1121, 1126 (1997) (burden of proof is beyond a reasonable doubt). Further, California provides a statutory right to a jury trial when a prior conviction is alleged:

> [T]he question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or in the case of a plea of guilty or nolo contendere, by a jury impaneled for that purpose, or by the court if a jury is waived.

§ 1025(b); see also § 1158, *Nguyen*, 46 Cal. 4th at 1011, 209 P.3d at 948. These facets of state law establish—contrary to petitioner's argument—that the *Apprendi* rule is not implicated in petitioner's case.

> *Apprendi* requires, at most, the right to a jury trial in the current criminal proceeding with respect to any sentencing fact that may increase the maximum punishment for the underlying conviction. California's statutory law afforded defendant the right to have a jury

> determine the existence of the sentencing fact here at issue—whether he suffered a "prior felony conviction" as defined by the Three Strikes law . . . .

Nguyen, 46 Cal. 4th at 1012, 209 P.3d at 949.

4. Petitioner dismisses his California jury-trial right, arguing incorrectly that *Apprendi* demands a jury determine *his guilt of the underlying offense, not the fact of a prior conviction*, before a prior juvenile adjudication can be used as a strike. Pet. at 27. Petitioner mistakenly views his prior *felonious conduct*, not his status as one who has suffered a wardship adjudication for a serious or violent felony, as the fact that must be proved beyond a reasonable doubt in order for his sentence to be increased for recidivism. See Pet. at 26-27.

His argument misconstrues California's Three Strikes law. The law makes the *juvenile adjudication itself*—not the conduct underlying the adjudication—the recidivist fact that increases a sentence. See § 667(c) (Three Strikes law is applicable if a defendant has "one or more prior felony convictions"); *id.* § 667(d)(3) ("A prior juvenile adjudication shall constitute a prior felony conviction" under specified circumstances); see also § 1170.12(a), (b)(3) (same). The California Supreme Court makes the point clearly:

> [U]nder *Apprendi*, any "fact" that allows enhancement of an adult defendant's maximum sentence *for the current offense* must, unless the defendant waives his jury-trial-right, be determined by a jury *in the current case.*
>
> Defendant's claim, of course, does not come within this express holding. The

> statutory relevant sentencing "fact" in this case is whether defendant's record includes a prior adjudication of criminal conduct that qualifies, under the Three Strikes law, as a basis for enhancing his current sentence. Aside from any exception that might apply here, the literal *rule* of *Apprendi* thus required only that a jury in the current proceeding determine the existence of such an alleged prior adjudication.
>
> California statutory law afforded defendant precisely this right. Whenever, for purposes of enhancing the sentence on the current charges, the prosecution alleges a prior conviction sustained by the defendant, and the defendant disputes the allegation, the question whether he or she "has suffered" the prior conviction must, unless a jury is waived, be submitted to a jury in the current proceeding. (§§ 1025, subds. (a), (b), 1158.) This jury-trial requirement would extend, of course, to a prior juvenile adjudication included within the Three Strikes law's definition of a "prior felony conviction."

Nguyen, 46 Cal. 4th at 1015, 209 P.3d at 950-51.

5. Under sections 1025 and 1158 petitioner had the right to demand that a jury determine the fact of a prior conviction beyond a reasonable doubt. But petitioner *waived* the right to have the jury determine the 1999 juvenile adjudication. *Nguyen*, 46 Cal. 4th at 1012, 209 P.3d at 949 ("California statutory law afforded defendant the right to have a jury determine the existence of the sentencing fact here at issue-whether he suffered a 'prior felony

conviction' as defined by the Three Strikes Law-but he waived that right"); *id.* at 1015, 209 P.3d at 951 ("defendant expressly waived his right to a jury trial in the current proceeding on the issue whether he had suffered the alleged prior, and he agreed to submit that issue to the court"). Because petitioner did not admit the allegation that he suffered a prior conviction and only waived his jury-trial right, he necessarily agreed to the court determining the truth of the fact used to enhance his sentence. For this reason, among others, *Apprendi* is not implicated and does not bar petitioner's Three Strikes sentence.

6. This case presents no occasion to consider under *Apprendi* the scope of the jury-trial right afforded by sections 1025 and 1158. The California Supreme Court declined to address that issue since petitioner did not preserve it. See *Nguyen*, 46 Cal. 4th at 1015, n.8, 209 P.3d at 951, n.8 (petitioner's failure to challenge the adequacy of section 1025 to protect his *Apprendi* rights forfeited the claim). The State was not asked to defend against a claim that its statutes inadequately protect *Apprendi* rights of criminal defendants with prior convictions. Because there is no judgment on that issue, the contention cannot be addressed in this case.

The relevant judgment, as explained by the California Supreme Court, is that the Three Strikes law does not impinge *Apprendi* rights given California's statutory jury-trial right afforded to criminal defendants and that petitioner waived his jury-trial right on the truth of his prior wardship adjudication in this case. Neither of the California Supreme Court's judgments on those points merits review by this Court.

II. A JUVENILE WARDSHIP ADJUDICATION FOR A SERIOUS OR VIOLENT FELONY IS CONSTITUTIONALLY VALID PROOF OF RECIDIVISM

1. Even if California had not provided petitioner a jury-trial right on the truth of his prior-conviction allegation, petitioner's *Apprendi* claim would fail. The California Supreme Court correctly found that juvenile wardship adjudications fall within *Apprendi*'s exception for "prior convictions."

> [W]e find nothing in the *Apprendi* line of cases, or in other Supreme Court jurisprudence that interferes, under the circumstances here presented, with what the high court deemed a sentencing court's traditional authority to impose increased punishment on the basis of the defendant's recidivism. That authority may properly be exercised, we conclude, when the recidivism is evidenced, as here, by a *constitutionally valid* prior adjudication of criminal conduct.

Nguyen, 46 Cal. 4th at 1012, 209 P.3d at 949. That conclusion is correct and fully consistent with this Court's jurisprudence.

2. The fact of a prior conviction is exempted from the principle that facts used to increase a defendant's sentence beyond the statutory maximum provided for the offense must be found by a jury or admitted by the defendant. *Apprendi*, 530 U.S. at 490. *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) (*Almendarez-Torres*), viewed prior convictions as essentially unique in this respect. The Court reasoned "that the relevant subject matter is recidivism. That subject matter—the prior commission of a serious crime—is as typical a

sentencing factor as one might imagine." *Id.* at 230; see also *id.* at 243.

3. Contrary to petitioner's argument, *Jones* v. *United States*, 526 U.S. 227 (1999) (*Jones*), does not support his claim that *Apprendi* impliedly bars the use of juvenile adjudications as evidence of recidivism. See Pet. at 12. *Jones* cited *Almendarez-Torres* to observe that "[t]he Court's repeated emphasis on the distinctive significance of recidivism leaves no question that it regards that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing." *Jones*, 526 U.S. at 249. *Jones* observed that "[o]ne basis for the possible constitutional distinctiveness [of recidivism] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.*

Jones did not thereby define the judicial proceedings whose judgments constitute the fact of a prior conviction. Nor did it limit the kinds of trial proceedings that competently prove recidivism. Instead, it identified one basis, among others, for "justif[ying] the single exception [this Court] consistently recognizes to the rule that a jury must find sentencing facts which increase the maximum punishment—the exception for the 'fact of a prior conviction.' [Citations.]" *Nguyen*, 46 Cal. 4th at 1016, 209 P.3d at 951. Taking *Jones*' reference to the jury-trial guarantee out of context ignores the Court's repeated emphasis on the distinctive nature of recidivism as a traditional basis for increasing a defendant's punishment. Indeed, *Jones* itself was not a case involving enhancement of a sentence based on a prior conviction. Instead, it concerned a statute

that provided for increased punishment depending on the severity of the victim's injuries. *Jones*, 526 U.S. at 229. Thus, the *Jones* dicta is not controlling.

Apprendi deemed it unnecessary to revisit *Almendarez-Torres*, and the Court retained the jury-trial exception for recidivism. "Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum statutory range." *Apprendi*, 530 U.S. at 488.

Apprendi, like *Jones*, did not involve the use of a prior conviction to enhance a sentence. It concerned a hate-crimes statute that extended the sentence if a crime had been committed "with the purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity." *Apprendi*, 530 U.S. at 469. This Court distinguished that law from the one in *Almendarez-Torres*: "The reasons supporting an exception from the general rule for the statute construed in [*Almendarez-Torres*] do not apply to the New Jersey statute [in *Apprendi*]. Whereas recidivism 'does not relate to the commission of the offense' itself, [*Almendarez-Torres*,] 523 U.S. at 230, 244, New Jersey's biased purpose inquiry goes precisely to what happened in the 'commission of the offense.'" *Apprendi*, 530 U.S. at 496.

4. Petitioner infers from those decisions that recidivism may increase the maximum sentence *only* if past criminal conduct is found by a jury in the current proceeding or was found by a jury in a prior proceeding. As the California Supreme Court explained, however, that is not a fair reading of this

Court's decisions. This Court, it noted, has confirmed that minors are entitled to many procedural rights and protections they would enjoy as adult criminal defendants (*In re Gault*, 387 U.S. 1 (1966); *In re Winship*, 397 U.S. 358 (1970)), but the Constitution does not require the right to a jury trial in juvenile proceedings (*McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971) (*McKeiver*). See *Nguyen*, 46 Cal. 4th at 1019, 209 P.3d at 953. *McKeiver* "made clear that the absence of a right to a trial by jury did not appreciably undermine the accuracy of the factfinding function in juvenile cases. (*McKeiver*, *supra*, at p. 543 (plur. opn. of Blackmun, J.); *id.* at p. 551 (conc. opn. of White, J.).)" *Nguyen*, 46 Cal. 4th at 1023, 209 P.3d at 956.

Jones and *Apprendi* note the importance of procedural safeguards in explaining the exception for prior convictions. But neither case held that a jury-trial right is the *sine qua non* of those safeguards. *Jones*, 526 U.S. at 249; *Apprendi*, 530 U.S. at 488. In *McKeiver*, this Court held that a minor's constitutional rights are ensured in juvenile court even though there is no jury-trial right. *McKeiver*, 403 U.S. at 543, 551. It is incongruous to conclude that a juvenile adjudication is constitutionally sound without the right to a jury in a current proceeding, but constitutionally unsound as proof of recidivism in a later proceeding.

Juvenile wardship proceedings are constitutionally valid adjudications of criminal activity. Therefore, the California Supreme Court properly concluded that this Court's decisions do not limit the prior-conviction exception to judgments in proceedings encompassing a jury-trial right.

> We do not read the passages from *Almendarez-Torres* . . . , *Jones* . . . , and *Apprendi* . . . as prohibiting the use of

> previously adjudicated criminal misconduct to authorize an increased sentence in a later criminal case unless the prior proceeding—whether juvenile or adult—specifically included the right to a jury trial. . . .
>
> We first note the obvious: Neither *Jones* nor *Apprendi* was directly concerned with deciding the circumstances under which prior adjudications of criminal conduct may be used to enhance the maximum sentence for a subsequent adult offense. Hence, the court's comments on that subject were dictum.
>
> Moreover, nothing in *Jones* or *Apprendi*, or in *Almendarez-Torres* itself, stated or implied that a prior criminal adjudication forming the basis of a "recidivism" sentencing factor in an adult criminal proceeding must always have been obtained in a proceeding that included, in particular, the right to a jury trial. Those cases cited a group of procedural rights and safeguards that make prior adult convictions fair and reliable evidence of previous criminal misconduct, but they did not state that each and every one of those guarantees or any one of them in particular, is essential to the availability of a prior criminal adjudication to furnish such proof.
>
> Finally, . . . *Apprendi* and its progeny concern an *adult's* right to jury findings, in the adult case, of all previously unadjudicated facts that bear upon the maximum sentence for the adult offense.

> On the other hand, these decisions have suggested that recidivism already adjudicated in fair and reliable prior proceedings may be used to enhance later sentences without new jury involvement, and the high court has not disturbed *McKeiver*'s determination that juvenile adjudications of criminality are constitutionally fair and reliable even though the Constitution does not require jury trial in juvenile proceedings.
>
> Under these circumstances, we decline to hold that a prior juvenile adjudication, highly probative on the issue of recidivism, is unavailable to enhance the punishment for the individual's subsequent adult offenses, for the sole reason that there was no right to a jury trial in the juvenile case.

Nguyen, 46 Cal. 4th at 1023-24, 209 P.3d at 956-58.[4]

5. Petitioner asserts that "[p]ermitting an increased maximum sentence based upon a juryless juvenile adjudication diminishes and erodes the jury's function because it authorizes past findings to

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[4] See also *id.* at 1023, 209 P.3d at 956:

> So long as an accused adult is accorded his right to a jury trial in the adult proceeding as to all the facts that influence the maximum permissible sentence, no reason appears why a constitutionally reliable adjudication of criminality, obtained pursuant to all procedural guarantees constitutionally due to the offender in the prior proceeding—specifically including the right to proof beyond a reasonable doubt—should not also be among the facts available for that sentencing purpose.

be labeled as 'convictions' as long as the legislature doesn't stray 'too far' from what looks like a criminal conviction. [Citation.]" Pet. at 12. Juryless adjudications in juvenile delinquency proceedings do not violate the Sixth Amendment. *McKeiver*, 403 U.S. at 545, 557. In criminal court, petitioner had and waived a jury-trial right on the truth of the prior adjudicated fact used to increase his sentence. See §§ 1025, 1158. Moreover, juvenile adjudications fall within the *Almendarez-Torres* exception for prior convictions. "The Three Strikes law's use of juvenile adjudications affects only the length of the sentence imposed on an adult offender, not the finding of guilt in the adult court nor the adjudication process in juvenile court." *People* v. *Fowler*, 72 Cal. App. 4th 581, 586 (1999). Recognition that juvenile wardship adjudications are valid evidence of recidivism does not denigrate Sixth Amendment protections. Petitioner was not deprived of Sixth Amendment rights in either the juvenile court or the criminal court.[5]

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[5] While directing his aim at wardship adjudications that prove recidivism, petitioner targets much more. He invites the Court to overrule *Almendarez-Torres*. Pet. at 14, n.11 ("to the extent that this Court wishes to use this case as a vehicle for reconsidering *Almendarez-Torres*, the validity of that decision could be considered 'fairly encompassed' within the question presented"). He also questions *McKeiver*. See Pet. at 25 ("commentators" believe that "juvenile proceedings may not be as reliable as adult criminal proceedings and that it is easier for prosecutors to obtain juvenile adjudications than criminal convictions").

In the California Supreme Court petitioner disclaimed that his argument required overruling or reconsidering either *Almendarez-Torres* or *McKeiver*. See Appellant's Answer Brief on the Merits at 6-7 (arguing that juvenile wardship adjudications fall outside the *Almendarez-Torres* exception); *id.* at 27 ("Appellant is not arguing that juveniles are entitled to

(continued...)

6. Petitioner asserts that the judgment below would allow any adjudication—even school suspensions—to enhance a sentence so long as the adjudication was "reliable." Pet. at 12; see also Pet. at 21-23. This grossly overstates the decision in *Nguyen*. It did not adopt any "reliability" test. To the contrary, it holds that a "sentencing court's traditional authority to impose increased punishment on the basis of the defendant's recidivism . . . may properly be exercised . . . when the recidivism is evidenced, as here, by a *constitutionally valid* prior adjudication of criminal conduct." *Nguyen*, 46 Cal. 4th at 1012, 209 P.3d at 949. Juvenile adjudications are valid evidence of recidivism not just because they are "valid, fair, and reliable" (see *Nguyen*, 46 Cal. 4th at 1019; 209 P.3d at 953), but because they are judgments in constitutionally valid judicial proceedings (see *McKeiver*, 403 U.S. 528) in which minors are adjudicated wards based on their commission of criminal conduct and, on that basis, properly may be subjected to loss of liberty (see *Nguyen*, 46 Cal. 4th at 1019, 209 P.3d at 953 (juvenile proceedings include all the constitutional protections applicable to such matters)). If juryless trials in juvenile court abridged fundamental constitutional rights, this Court would not have sanctioned them.

7. Acceptance of petitioner's argument that juryless adjudications are incompetent evidence of recidivism under the Sixth Amendment would have profound and unacceptable consequences to the

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(...continued)
jury trials"). Thus, this case presents no opportunity to reconsider either decision. Cf. Supreme Court Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons").

criminal justice system aside from barring the use of prior juvenile adjudications to enhance criminal sentences. Seemingly, it would invalidate as evidence of recidivism *any* adjudicated finding of criminal conduct reached in a proceeding where the defendant lacked a constitutional jury-trial right. That would prohibit the use of a juryless misdemeanor prior conviction to enhance the punishment for a later offense, thus undermining prototypical state recidivism schemes for offenses like driving under the influence with a prior adjudication for the same offense. See, *e.g.*, *People* v. *Palmer*, 142 Cal. App. 4th 724, 734 (2006) (upholding use of a Nevada juryless-misdemeanor conviction of driving under the influence to enhance a California drunk-driving offense). That result would require this Court to overrule *Nichols* v. *United States*, 511 U.S. 738 (1994), which held that a prior constitutionally valid uncounseled misdemeanor conviction can be used in a subsequent federal felony proceeding to increase a defendant's criminal history score, and thus the maximum punishment, for a felony offense. *Id.* at 747-48, overruling *Baldasar* v. *Illinois*, 446 U.S. 222 (1980).

Nguyen correctly analyzed this Court's precedents and found no legitimate basis for excluding juvenile adjudications from the category of "prior convictions" exempted from the *Apprendi* rule.

III. No Significant Conflict of Decisions Exists, Nor Would Certiorari in this Case Resolve Any Residual Case-law Tensions

1. Petitioner asserts that considerable disagreement in lower courts exists on the use of juvenile adjudications as evidence of recidivism and that the issue should be resolved in a California case

because of the preeminent influence of the state supreme court. Pet. at 7. Petitioner's thesis vastly overstates any lower-court conflict. After *Apprendi*, various federal circuit and state supreme courts addressed the use of prior juvenile adjudications as sentencing factors in criminal cases. The overwhelming majority of those courts have concluded that nonjury juvenile adjudications fall within the *Almendarez-Torres* exception to *Apprendi*'s Sixth Amendment jury-trial right. Moreover, to the extent any conflict of decisions among lower courts exists, certiorari here is unlikely to resolve it. California law is distinct from the laws considered by the lower federal courts and state supreme courts. Specifically, California grants the defendant a jury trial in the current proceeding to decide the allegation of a prior juvenile adjudication before the court can use it to enhance a sentence above the statutory maximum. See §§ 1025, 1158.

2. In *Nguyen*, the California Supreme Court surveyed cases from other states and the federal circuit courts in analyzing the issue. It correctly found that the overwhelming majority of other jurisdictions reject claims that the Sixth Amendment—and *Apprendi*—bar the use of nonjury-juvenile adjudications as evidence of recidivism. The *Nguyen* court summarized the rationale of the majority decisions.

> Prior juvenile adjudications substantially satisfy all the reasons set forth in *Almendarez-Torres*, *Jones*, and *Apprendi* why prior convictions may be employed to increase the maximum punishment for a subsequent adult offense without the need for jury findings in the later case. Like prior adult criminal convictions, such prior juvenile judgments do not involve facts

about the current offense that were withheld from a jury in the current case, but instead concern the defendant's *recidivism*—i.e., his or her status as a *repeat offender*—a basis on which courts, acting without juries, traditionally have imposed harsher sentences. Moreover, the prior criminal misconduct establishing this recidivism was previously and reliably adjudicated in proceedings that included all the procedural protections the Constitution requires *for such proceedings*—indeed, every substantial safeguard required in an adult criminal trial except the right to a jury. Use of such reliably obtained juvenile judgments of prior criminality to enhance later adult sentences does not offend an *adult defendant's* constitutional right to a jury trial in an adult criminal proceeding. Conversely, it makes little sense to conclude, under *Apprendi*, that a judgment of juvenile criminality which the Constitution deemed fair and reliable enough, when rendered, to justify confinement of the minor in a correctional institution is nonetheless constitutionally inadequate for later use to establish the same individual's recidivism as the basis for an enhanced adult sentence. Such a determination would preclude a rational and probative basis for increasing an adult offender's sentence—that he or she was not deterred from criminal behavior by a youthful brush with the law—unless juveniles were afforded a right to a jury

> trial, *which the Constitution does not require.*

Nguyen, 46 Cal. 4th at 1021-22, 209 P.3d at 955.

3. The Ninth Circuit is the only federal circuit court to disapprove the use of juvenile adjudications as proof of recidivism in light of *Apprendi*. Concluding that juvenile adjudications fall outside the *Almendarez-Torres* exception for prior convictions, a divided panel in *United States* v. *Tighe*, 266 F.3d 1187 (9th Cir. 2001), relied on the dicta from *Jones*, 526 U.S. 227, discussed above, to reason that "'a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees.'" *Tighe*, 266 F.3d at 1193 (quoting *Jones*, 526 U.S. at 249).

Tighe does not conflict with the California Supreme Court's decision in *Nguyen* in any way that requires this Court's intervention. The Ninth Circuit, acknowledging *Tighe* is not compelled by clearly established law of this Court, denies petitions for habeas corpus raising *Apprendi* challenges to California's Three Strikes law. See *Boyd* v. *Newland*, 467 F.3d 1139, 1152 (9th Cir. 2006).

4. Five other federal circuits reject *Tighe* and hold that nonjury juvenile adjudications are competent proof of recidivism. See *United States* v. *Matthews*, 498 F.3d 25, 35 (1st Cir. 2007); *United States* v. *Jones*, 332 F.3d 688, 696 (3rd Cir. 2003); *United States* v. *Crowell*, 493 F.3d 744, 749-51 (6th Cir. 2007); *United States* v. *Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002); *United States* v. *Burge*, 407 F.3d 1183, 1187-1191 (11th Cir. 2005).

5. Like the California Supreme Court, most state supreme courts considering the issue have found no constitutional barrier to the use of nonjury

juvenile adjudications as sentencing factors. See *Ryle* v. *State*, 842 N.E.2d 320, 321-23 (Ind. 2005); *State* v. *Hitt*, 273 Kan. 224, 42 P.3d 732, 740 (2002); *State* v. *McFee*, 721 N.W.2d 607, 615-18 (Minn. 2006); and *State* v. *Weber*, 159 Wash. 2d 252, 255, 149 P.3d 646, 649-53 (2006).

In *State* v. *Harris*, 339 Ore. 157, 118 P.3d 236, 238-46 (2005), the Oregon Supreme Court held juvenile adjudications can increase sentences for adult felons so long as a jury is available to find the prior juvenile adjudication in the current case. Given sections 1025 and 1158, California's Three Strikes law would satisfy the Oregon Supreme Court's requirements.

6. In the teeth of an array of federal and state decisions contrary to his position, petitioner places principal reliance on *State* v. *Brown*, 879 So. 2d 1276, 1281-90 (La. 2004). See, *e.g.*, Pet. at 17-18. However, the Louisiana Supreme Court there found juvenile adjudications not to constitute an adjudication of crime as a matter of state law. In light of the Louisiana Constitution's requirement of the right to a jury trial as a prerequisite to a criminal conviction, the court stated "[i]t would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancer." *Brown*, 879 So. 2d at 1289. *Brown*'s reasoning is, of course, not a representation of the Louisiana Supreme Court's view of the Sixth and the Fourteenth Amendments.

7. Repudiating petitioner's primary argument for certiorari, this survey reflects no significant conflict among the federal or state supreme courts on the question presented. For many years, nonjury juvenile adjudications have been deemed constitutionally valid indicators of an adult criminal defendant's recidivist behavior by federal and state

courts. See *Consideration of Accused's Juvenile Court Record in Sentencing for Offenses Committed as an Adult*, 64 A.L.R. 3d 1291 (1975) (the practice of considering prior juvenile adjudications at sentencing has long been accepted); 18 U.S.C. § 5038(a)(2) (considering juvenile adjudications at sentencing authorized by the Federal Youth Corrections Act); see also *Oregon* v. *Ice*, __ U.S. __, 129 S. Ct. 711, 713 (2009) (in deciding whether *Apprendi* should be extended, Court considers "[t]hese two considerations—historical practice and respect for state sovereignty"). The California Supreme Court's judgment in *Nguyen* represents no breach in Sixth Amendment jurisprudence, but rather a reaffirmation of established principles found in numerous earlier decisions of federal and state courts.

8. Equally as important, any variance between lower courts' views on this issue cannot be resolved effectively here in light of distinguishing features of California law. Notably, *Tighe*, *Smalley*, *Jones*, *Burge*, and *Crowell* concerned sentencing under the Armed Career Criminal Act. 18 U.S.C. § 924(e) ("ACCA"). That statute, unlike California law (see §§ 1025, 1158), provides no right to a jury trial on the question of whether the defendant has suffered a prior conviction used to enhance the sentence. Just as no jury right attaches to an allegation of a prior juvenile adjudication used for sentence enhancement in those federal circuit decisions, no right to jury trial on the fact of a prior juvenile adjudication exists under the laws upheld in the cited state supreme court decisions.

To the extent any tension appears among the decisions, it principally concerns not whether a prior juvenile adjudication is competent proof of recidivism, but whether a criminal defendant has the

right to a jury determination of the fact of a prior juvenile adjudication. Because petitioner enjoyed a jury-trial right on precisely that issue, certiorari in this case would not resolve those tensions.

More generally, state-created jury trial rights like California's are both unique and obviate concerns over the use of prior juvenile adjudications to enhance criminal sentences. The question presented seems more naturally and cleanly decided in cases from jurisdictions not affording such a right to criminal defendants.

IV. THE DUE PROCESS CLAIM, THAT FELONS WITH PRIOR WARDSHIP ADJUDICATIONS FOR VIOLENT OR SERIOUS FELONIES ARE TREATED UNFAIRLY BY THE THREE STRIKES LAW, DOES NOT WARRANT CERTIORARI

1. Petitioner asserts that California dealt with him unfairly by considering his prior wardship adjudication as evidence of his recidivism. He avers: "To provide minors with fewer procedural safeguards in the name of rehabilitation and then to use adjudications so obtained to punish them more severely as adults would be 'contradictory and fundamentally unfair.' [Citations.]" Pet. at 25-26; see also Pet. at 35 ("The application of habitual offender statutes to juveniles is unfair because this Court has recognized that they are 'categorically less culpable than the average criminal'"). To the extent petitioner seeks to frame a Fourteenth Amendment Due Process claim, he provides no basis for certiorari.

2. The Court has "'defined the category of infractions that violate "fundamental fairness" very narrowly' based on the recognition that, '[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'

[Citations.]" *Medina* v. *California*, 505 U.S. 437, 443 (1992). In an earlier wardship case, the State deemed petitioner fit to be dealt with under the juvenile court law, rather than under the criminal law, for his commission of a serious felony. That was no assurance the resulting wardship adjudication could never be used to increase punishment in criminal court if petitioner as an adult reoffended.

Nor did the State assure petitioner that his wardship adjudication would not be deemed criminal in nature. California's Three Strikes law was enacted by legislation and voter initiative in 1994. See *People* v. *Hazelton*, 14 Cal. 4th 101, 104-05, 926 P.2d 423, 424-25 (1996). The law increases the maximum sentence for a felony offense upon proof that the defendant has suffered one or more qualifying "prior felony convictions"—a term that specifically includes certain wardship adjudications for felony sustained by a minor sixteen years or older under the juvenile court law. §§ 667(d)(3), 1170.12(b)(3); *Nguyen*, 46 Cal. 4th at 1010, 209 P.3d. at 947.

Petitioner committed the felony that led to his juvenile wardship adjudication in 1999. C.T. 6-8. The Three Strikes law was an established part of California law and clearly stated that a juvenile wardship adjudication for a violent or serious felony can be used as a strike under circumstances specified in that law. §§ 667(d)(3), 1170.12(b)(3). Thus, California broke no guarantee to petitioner that his juvenile wardship adjudication would not be deemed evidence of recidivism in criminal court.

The State has dealt with wards like petitioner fairly. As an adult, petitioner has forsaken the leniency shown him earlier by the juvenile court—thus subjecting himself to the laws attendant to the criminal court, including the Three Strikes law. If

any representation was made to petitioner in his juvenile case respecting recidivism, it was that the adjudication *could* be used to subject him to a harsher adult sentence if he reoffended because his wardship was for a serious felony meeting the definition of a strike.

3. Just as the State never promised continued lenient treatment to petitioner if he reoffended as an adult, no evidence exists that the use of his wardship adjudication as proof of recidivism works unfairness. The state is not punishing petitioner more harshly for his *juvenile offense*. The Three Strikes law imposes no punishment for past juvenile conduct, only for the *current crime*, due to the felon's habitual criminality. As the California Supreme Court explains:

> If the *parens patriae* features of the juvenile justice system have succeeded in rehabilitating a youthful offender, all well and good. But if the person was not deterred, and thus reoffends as an adult, this recidivism is a highly rational basis for enhancing the sentence for the adult offense

Nguyen, 46 Cal. 4th at 1023, 209 P.3d at 956.

4. *Nguyen* rejected a free-standing due process challenge to the Three Strikes law. The court correctly found that the claim is based on state statutory law, not on federal constitutional grounds. It also found that the argument ignores the clear intent of the People of California, expressed through the adoption of the Three Strikes law, to consider certain specified juvenile adjudications as evidence of recidivism making the recidivist subject to harsher punishment.

> Amici curiae . . . argue that to allow the use of juvenile adjudications to enhance later adult sentences "is inconsistent with the purpose of juvenile court and disregards California's carefully drawn boundaries between juvenile and adult court jurisdiction." This argument, essentially based on nonconstitutional state law, overlooks the express provision in California's Three Strikes law that certain serious prior juvenile adjudications shall be deemed "prior convictions" available for adult sentence enhancement. (§§ 667, subd. (d)(3), 11070.12, subd. (b)(3).)

Nguyen, 46 Cal. 4th at 1025 n.12, 209 P.3d at 958 n.12. As a state law claim, petitioner's "fairness" challenge is not cognizable and provides no basis for certiorari.

5. Even if viewed as a constitutional due process argument, petitioner's claim provides no sound basis for certiorari. "The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina*, 505 U.S. at 443. Hence, the Due Process Clause is violated only if the state procedure "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Id.* at 446 (citing *Patterson* v. *New York*, 432 U.S. 197, 202 (1977)).

Petitioner fundamentally rests his challenge to the use of prior wardship adjudications as proof of

recidivism in criminal cases on the particularized statutory rehabilitative goals underlying a wardship adjudication. Undoubtedly, the goal of rehabilitation and reformation of the individual is one reason, among others, justifying the nonjury feature of a wardship adjudication. That wardship adjudications further the goal of rehabilitation, however, does not mean that they are incompetent proof of recidivism when the defendant fails to take advantage of the leniency offered and reoffends. A grant of probation also carries with it the goal of rehabilitation. Yet, it cannot be said that it offends due process to consider a defendant's failure under such a rehabilitative program in evaluating an appropriate sentence in a later criminal case. Both the juvenile and probation systems provide benefits for those who are successful and fulfill the promise for which the systems are designed. The rehabilitative goal of the systems, however, does not insulate the underlying criminal conduct from future scrutiny when the defendant fails to meet that goal.

As this claim falls well outside both the jurisprudence of this Court and the recognized restrictions placed on the States by the Due Process Clause, and there is no conflict of decisions concerning the point, certiorari is unnecessary.

V. PETITIONER'S ADMISSION OF THE STRIKE OFFENSE IN JUVENILE COURT RENDERS CERTIORARI INAPPROPRIATE

1. In *Blakely*, 542 U.S. 296, this Court held that the statutory maximum for *Apprendi* purposes is the maximum sentence that a court can impose without finding any additional facts. *Id.* at 303-04. Juries, and not judges, must determine additional facts that could permit a sentence above the standard range for a particular offense. The Court noted, however, that

a defendant may admit those facts, thereby waiving his *Apprendi* rights. "When a defendant pleads guilty, the State is free to seek a judicial sentence enhancement so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." *Id.* at 310; see also *id.* at 303 ("the 'statutory maximum' sentence for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"); *Apprendi*, 530 U.S. at 488 (noting that Almendarez-Torres failed to challenge the accuracy of the prior conviction allegations, alleviating the constitutional tension that might otherwise exist by the use of his priors to enhance his sentence had the facts been contested).

2. Here, petitioner admitted in the juvenile court the conduct alleged in the juvenile delinquency petition. *Nguyen*, 46 Cal. 4th at 1013, 209 P.3d at 949 ("The court file in the 1999 juvenile matter indicates, among other things, that the defendant there admitted to a violation of section 245, subdivision (a)(1)".)[6] Thus, he admitted the relevant facts of the serious felony offense were those alleged by the State.

3. Petitioner asserts that this Court should disregard his admission because he did not have a jury-trial right to waive when he admitted the

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[6] As stated, *ante*, n.2, because the documents submitted to prove petitioner's prior juvenile adjudication became unavailable, the California Court of Appeal "took judicial notice of the juvenile court file." *Nguyen*, 46 Cal. 4th at 1013, n.4, 209 P.3d at 1013, n.4. As petitioner did not move to make the juvenile court file a part of the record on appeal (and respondent does not have a copy of it), the record deficiency, and any questions it may leave unanswered regarding the juvenile court proceedings, reinforces the unsuitability of this case for certiorari.

allegation in the California Juvenile Court. Pet. at 27-28. Petitioner also suggests that a juvenile's admission of criminal conduct "is arguably less reliable" than an adult's. Pet. at 29. His contention unjustifiably overlooks his waiver of his constitutional rights to a contested factual hearing before entering his admission in the juvenile proceeding—a proceeding that meets all constitutional requirements for a valid judgment.

Petitioner's admission of the allegation released the prosecution in the juvenile-court proceeding from the obligation of proving the truth of the conduct underlying the adjudication. That constitutionally established the fact of a prior conviction qualifying as a strike in the instant criminal case. Petitioner should not be heard to claim this Court must ignore his admission some five years ago and now require the prosecution to prove the conduct underlying his juvenile adjudication in a separate trial in criminal court that is neither designed nor intended for that purpose. Notwithstanding petitioner's admission of the allegation, California provided him an opportunity to challenge the juvenile court's adjudication of wardship by direct appeal. See Cal. Welf. & Inst. Code § 800. Petitioner cannot be allowed to wait until the juvenile adjudication is alleged as a recidivist factor before challenging its validity. Cf. *Custis* v. *United States*, 511 U.S. 485, 486 (1994) (with the sole exception of convictions obtained in violation of the right to counsel, a defendant in a federal sentencing proceeding has no right to collaterally attack the validity of previous state convictions used to enhance an ACCA sentence).

Petitioner not only had admitted the underlying conduct alleged in juvenile court, he has waived his statutory right to a jury trial on the issue of his prior

wardship adjudication in criminal court. Petitioner has waived any jury-trial right that *Apprendi* might afford as a prerequisite to the use of his prior juvenile adjudication to increase his sentence. Thus, certiorari in this case is unwarranted.

VI. CERTIORARI SHOULD BE DENIED BECAUSE A SENTENCE REDUCTION IS IMPROBABLE UNDER CALIFORNIA'S REFORMED SENTENCING LAW

1. Petitioner's current sentence is below the statutory maximum for the crime he committed. The improbability of a favorable ruling benefiting him further supports the denial of certiorari.

2. When petitioner was sentenced, the prison terms available for possession of a firearm by a felon were sixteen months, two years, or three years. §§ 18, 12022.1(a)(1); see also *Nguyen*, 46 Cal. 4th at 1014, 209 P.3d at 950. The trial court chose the low term—sixteen months—and doubled it to thirty-two months based on the prior strike under the Three Strikes law. *Nguyen*, 46 Cal. 4th at 1014, 209 P.3d at 949-50.

Petitioner was sentenced in 2005 under California's original determinate sentencing scheme in which the middle term was the presumed maximum term. See *Nguyen*, 46 Cal. 4th at 1014, n.6, 209 P.3d at 950, n.6. After *Cunningham* v. *California*, 549 U.S. 270 (2007), the California Legislature amended the sentencing scheme to eliminate that presumption and to grant the trial court discretion—considering aggravating and mitigating circumstances—to select among the three terms specified by statute for the offense. See *People* v. *Sandoval*, 41 Cal. 4th 825, 843-45, 161 P.3d 1146, 1158-59 (2007). Under *Sandoval*, the maximum term

for *Apprendi* purposes in cases like petitioner's is three years, not two years.

3. Were petitioner to succeed in this Court, his case would be remanded for resentencing. Consistent with *Apprendi* and *Sandoval*, the California Superior Court could rely on petitioner's juvenile court record under the Three Strikes law to reimpose the doubled mitigated term of 32 months because that sentence is below the three-year maximum for the crime of which petitioner was convicted. Cf. *United States* v. *Booker*, 543 U.S. 220 (2005) (permitting enhancements based on judge-found facts with advisory federal sentencing guidelines).

For this additional reason, petitioner's case is a poor vehicle to resolve the sentencing claim he presents.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: February 2, 2010

Respectfully submitted,

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In the Supreme Court of the United States

VINCE VINHTUONG NGUYEN, *Petitioner*,

v.

CALIFORNIA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

SUPPLEMENTAL BRIEF CITING NEW AUTHORITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NEW AUTHORITY SUPPORTING DENIAL OF THE PETITION FOR CERTIORARI

THE FOURTH CIRCUIT COURT OF APPEALS HAS JOINED THE MAJORITY VIEW REJECTING *APPRENDI* CHALLENGES TO THE USE OF JUVENILE ADJUDICATIONS AS SENTENCING ENHANCEMENTS

Pursuant to Supreme Court Rule 15(8), respondent files this supplemental brief to bring to the Court's attention a recent case supporting its arguments against granting the Petition for Writ of Certiorari in this case. On February 3, 2010, after respondent's opposition brief was completed and in the printing phase, the United States Court of Appeals for the Fourth Circuit held that prior juryless juvenile adjudications can be used to enhance an adult sentence under the Armed Career Criminal Act 18 U.S.C. § 924(e) ("ACCA").

In *United States* v. *Wright*, __ F.3d __ (210 U.S. App. LEXIS 2307, 2010 WL 376549) (4th. Cir. 2010), the defendant was convicted of being a felon in possession of a firearm (18 U.S.C. § 922(g)). *Wright*, 210 U.S. App. LEXIS 2307 at *2, 2010 WL 376549 at *1. Based on his three prior juvenile adjudications for burglaries, the district court sentenced him under the ACCA to life imprisonment. *Wright*, 210 U.S. App. LEXIS 2307 at *6, 2010 WL 376549 at *2. The Fourth Circuit rejected the defendant's claim that the use of his juvenile adjudications to impose a life sentence violated *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because he was not entitled to a jury trial on the juvenile adjudications in South Carolina Family Court. *Wright*, 210 U.S. App. LEXIS 2307 at *7-*14, 2010 WL 376549 at *3-*5.[1]

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[1] South Carolina does not have separate juvenile courts, (continued...)

Wright supports respondent's argument that no significant conflict of decisions exists in the lower courts on the use of prior juryless juvenile adjudications to enhance an adult sentence. Like *Wright*, the overwhelming majority of lower courts have found no *Apprendi* violation in such use of juryless juvenile adjudications. See Cert. Oppo. at 18-24.

Wright also supports respondent's argument that should this Court want to address the issue of the use of juryless juvenile adjudications as sentence enhancements, there are opportunities to do so in a case that does not present the unique procedural protections that exist in a California Three Strikes law case. California provides an adult a statutory jury-trial right on the truth of a prior-conviction allegation before it can be used as a strike, including an allegation that the defendant has suffered a prior juvenile adjudication. This significantly distinguishes California law from the ACCA interpreted in *Wright* and other federal circuit court cases, and the laws addressed by other state supreme courts. See Cert. Opp. at 5-9, 23-24. Thus, the recent decision in *Wright* supports respondent's argument that the question presented can be decided more naturally and cleanly in a case from a jurisdiction not affording such a statutory jury-trial right to criminal defendants. See Cert. Opp. at 24.

(...continued)
but instead gives its family courts jurisdiction to adjudicate most juvenile offenses. Wright, 210 U.S. App. LEXIS 2307 at *6-*7, n.1; 2010 WL 376549 at *2, n.1.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: February 10, 2010

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